16-379

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 93.

PETER W. GEEKIE, SHERIFF OF OCONTO COUNTY, WISCONSIN, AND WILLIAM KLASS, PLAINTIFFS IN ERROR,

vs.

THE KIRBY CARPENTER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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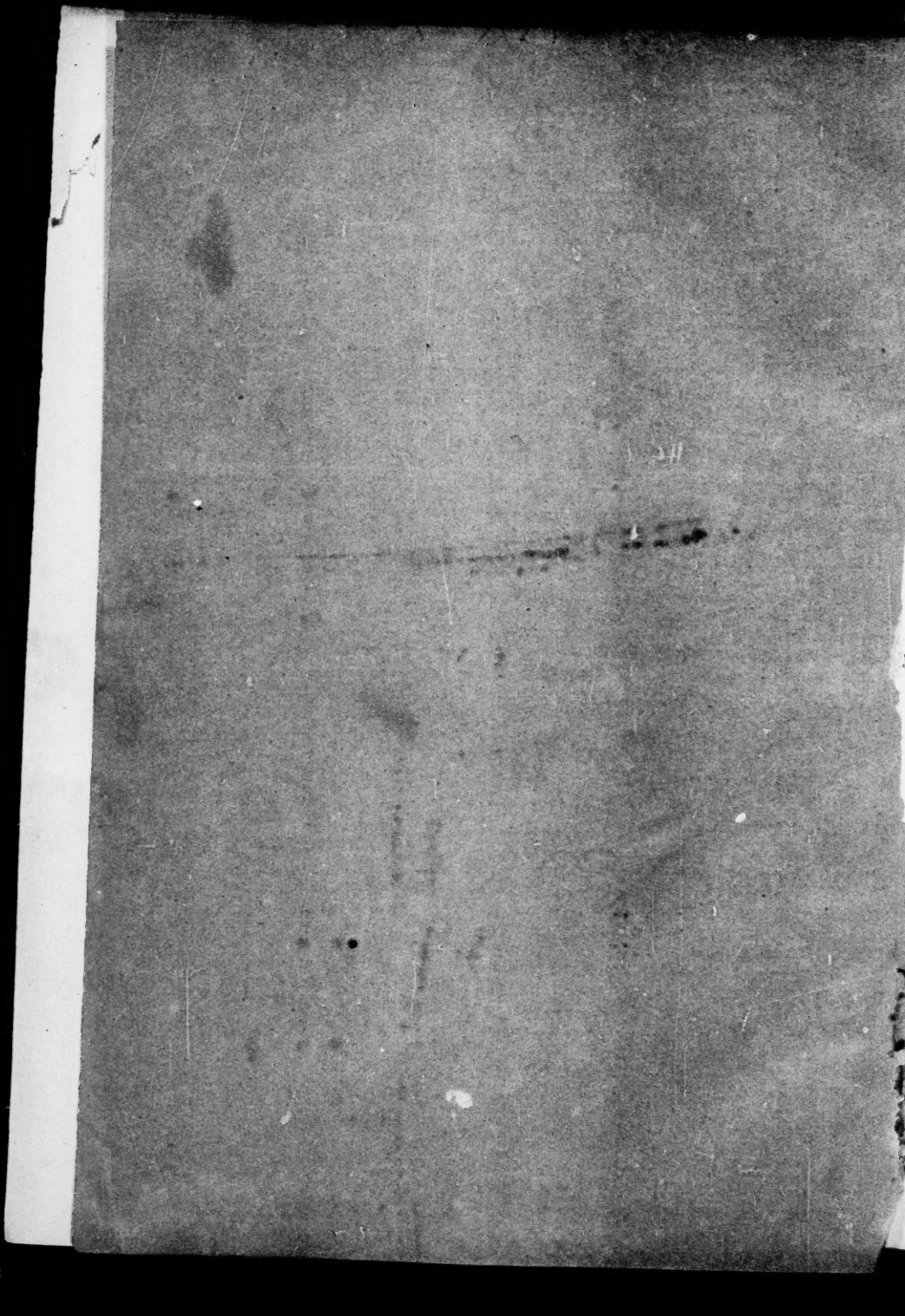
FILED OCTOBER 17, 1879.



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1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee, in said district, on the first Monday (being the sixth day) of January, A. D. 1879.

Present, the honorable Thomas Drummond, circuit judge, presiding, and the honorable Charles E. Dyer, district judge.

Among other the following proceedings were had, to wit:

PETER W. GEEKIE, SHERIFF OF OCONTO County, Wisconsin, & WILLIAM KLASS *vs.* THE KIRBY CARPENTER COMPANY. } At law.

Be it remembered that heretofore, to wit, at a term of said court begun and held according to law, at the city of Oshkosh, on the second Tuesday (being the tenth day) of July, A. D. 1877, present, the honorable Charles E. Dyer, district judge, presiding, and on the first day of said term, to wit, on the tenth day of July, A. D. 1877, the fol-

2 lowing proceedings were had, to wit:

Order docketing case on removal.

PETER W. GEEKIE, SHERIFF OF OCONTO County, Wisconsin, & WILLIAM KLASS *vs.* THE KIRBY CARPENTER COMPANY. } At law.

This day came the defendant's counsel, Mr. B. J. Brown, and presented to the court copies of the process, pleadings, and proceedings in this cause certified from the circuit court for Oconto County, in this district, pursuant to an order of said court, removing said cause to this court, including copies of the petition of said defendant for such removal, and the bond on behalf of said defendant required by law for such removal, and of said order of removal. Whereupon it is ordered by the court that the said copies be filed, and that the cause be entered on the law docket of this court, and be proceeded with in the same manner as if it had been commenced here by original process; which copies are as follows, to wit:

Certified copies from State court.

The State of Wisconsin, circuit court for Oconto County.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wisconsin, & WILLIAM KLASS, plaintiffs, *ag'st* THE KIRBY CARPENTER COMPANY, DEFENDANT. }

3 The State of Wisconsin to the above-named defendant:

You are hereby summoned and required to answer the complaint of P. W. Geekie, sheriff of Oconto County, Wisconsin, and Will-

iam Klass, the plaintiff in this action, which is hereto annexed and herewith served upon you, and you are required to serve a copy of your answer to the said complaint on the subscriber, at their office in the city of Green Bay, Brown County, Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the said complaint.

Witness the Hon. E. H. Ellis, judge of said court, at Oconto, in said county, this 21 day of November, A. D. 1876.

HASTINGS & GREEN &
JOHN J. TRACY,
Plaintiffs' Attorneys.

4 *Complaint.*

Circuit court for Oconto County.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wis., & William Klass, plaintiffs,
ag'st
THE KIRBY CARPENTER COMPANY, DEFENDANT.

The complaint of the above-named plaintiffs shows to this court:

That on the 15th day of March, 1876, the said plaintiff, Wm. Klass, was the owner and in possession of 1,257,310 feet of pine saw logs, then lying in the waters of the Menominee River, in the county of Oconto, Wisconsin.

That all of said logs were marked as follows, to wit, the character barred O was thus ⊕ stamped on the end of each log with a stamping iron, and on two sides of each log three hacks were cut thus 1 1 1 with an axe.

That on the 24th day of April, 1876, a writ of attachment was duly issued from and under the seal of said court in an action duly commenced therein, wherein one Joseph Laev was pl'ff, and said Wm. Klass was defendant, which said action was brought to recover and enforce a claim or demand for supplies furnished by said Laev to said Klass in cutting, falling, and hauling said logs, under the provisions of
5 chapter 154 of the laws of this State for the year 1862, and the laws amendatory thereof.

That at the time of the commencement of said action, which was on the 24th day of April, 1876, the said defendant, Wm. Klass, was, ever since has been, and still is, indebted to the said Joseph Laev for said supplies in the sum of sixteen hundred and sixty-five and $\frac{76}{100}$ dollars.

That said supplies were so furnished during the winter of 1875 & 1876, commencing on the 21st day of November, 1875, and ending on the 1st day of April, 1876, and were all furnished under one contract. That on the 20th day of April, 1876, the said Joseph Laev, plaintiff in said action, duly filed his statement or petition, under oath, for a lien upon said logs, in the office of the clerk of the circuit court for Oconto County, Wisconsin, which was the county wherein said supplies were furnished, and said logs cut, felled, and hauled as aforesaid.

That said statement or petition set forth briefly and stated the nature of said claim or demand, the amount due, and a description of the logs upon and against which a lien was claimed.

That before said attachment was executed the said petitioner or claimant, Joseph Laev, made and annexed thereto an affidavit stating
6 that the said Wm. Klass was indebted to the said Joseph Laev, and specifying the amount of such indebtedness over and above all legal set-offs, and showing that such indebtedness was due for and accrued for such supplies as entitled the plaintiff to a lien on said logs, describing the logs; and also stated that the said Laev had filed this petition for a lien. That said supplies consisted of feed used for teams, and the food necessarily used in camp to support the men in cutting, falling, and hauling said logs as aforesaid.

That said writ of attachment was directed to the plaintiff, P. W. Geekie, who then was and ever since has been the sheriff of the county of Oconto, and required and commanded him forthwith, as said sheriff, to attach and safely keep all the pine saw-logs aforesaid, in whosesoever hands or possession the same might be found, or so much thereof as should be necessary to satisfy the said plaintiff's claim in said action, togather with costs, disbursements, charges, and expenses, and so provided that the said logs so attached might be subject to further proceedings therein as the law provided, and that the said sheriff proceed thereon in the manner required of him by law.

That the said writ of attachment was duly delivered to the
7 said P. W. Geekie, as said sheriff, for service on the 24th day of April, 1876, and under and by virtue of said writ, he, on the 24th day of April, 1876, levied upon and attached all the logs aforesaid at the place where they were then lying, which was about one mile above the place in said river where the defendant unlawfully took possession of said logs as hereinafter stated.

That it was impossible for the said sheriff to safely keep said logs at said place where they were levied upon and attached as aforesaid, but it was necessary to run them down said river to the dividing pier near the mouth thereof, before the said sheriff could obtain a place where he could safely keep said logs, as commanded by said writ and as required by law.

That in the spring and summer of 1876 there was at least one hundred million feet of saw logs floating in and down said river, and that in running or floating them down to said dividing pier said logs became and were, as they always are, unavoidably intermingled, and the logs levied upon and attached as aforesaid, which necessarily being floated down said river as aforesaid, after said levy and attachment, became necessarily and unavoidably intermingled with said other logs, so that they could only be separated from the mass with which they
8 were so intermingled upon reaching said dividing pier, where by means of the said marks on said logs the said sheriff, if he had not been interfered with, as hereinafter mentioned, by the defendant, could have readily separated said logs and continued to keep them as commanded by said writ.

That when said logs commenced to float to and by said dividing pier, to wit, on or about the 24th day of April, 1876, the said sheriff requested the Menominie River Manufacturing Company, a corporation duly organized and doing business under and by virtue of chapter 283 of the private and local laws of Wisconsin, for the year 1866, through its officers and agents in charge of said pier, and engaged in dividing logs for the various owners thereof, to let the logs levied upon by said sheriff as aforesaid pass through the boom or booms of said corporation at and in the vicinity of said pier, to a point indicated by said sheriff, where the said sheriff could have kept and controlled said logs

as commanded by said writ and required by law. That the said corporation, by its officers and agents, and as plaintiffs are informed and believe, by the fraudulent and wrongful procuration of the defendant, and wrongful connivance with the defendant, refused and neglected to comply with said request, and endeavored to let said logs through
9 its booms at points indicated by the defendant, where they would pass into the possession of the defendant.

That by reason of said neglect and refusal, and said conduct of said corporation, to wit, said Menominee Manufacturing Company, through its officers and agents, instigated by the defendant, as plaintiffs are informed and believe, the said sheriff was compelled in order to safely keep said logs, and hold the same as required by said writ and by law, to divide and separate said logs himself, and was necessarily compelled to and did employ laborers at great expense to effect such separation and dividing.

That as soon as the said sheriff attempted to effect such separation, the said defendant directed a large force of its employees to take said logs and prevent the said sheriff from taking them, and by such employees the defendant did take said logs and prevent the said sheriff from separating them so as to obey the command of said writ as aforesaid.

That said employees of the defendant numbered from 10 to 25 men, and were stationed at such a distance above said dividing pier as to enable them to take said logs through said booms before they came to the place where the said sheriff was attempting to separate and safely keep said logs. That it was impossible for the said sheriff to
10 separate and safely keep said logs as required by said writ without employing a force of men greater than that employed by defendant, which would have caused, as plaintiff is informed and believes, strife and violence, as well as an enormous expense, for which reason the said sheriff continued his endeavors to separate and keep said logs under his said writ, with sufficient help to separate and keep said logs as they came down, had it not been for the force and violence of the said defendant in preventing such separation by the said sheriff, and taking said logs itself, as aforesaid.

That the said sheriff with his force thus employed was only enabled to separate and keep, under his said writ, 158,364 feet of said logs, and that the defendant by said superior force wrongfully, wilfully, and maliciously, by its officers, agents, and employees against the protest of these plaintiffs, and well knowing of the existence of said writ, levy, and attachment as aforesaid, and while said logs were floating in the waters of this State, wrongfully converted the same to its own use, without the consent of the owners thereof, or of either of them.

That the value of said logs so taken, carried away, and converted by the said defendant, at the time they were so taken was eighty-five hundred dollars. That the expense of said sheriff in proceeding
11 under his said writ to separate said logs so that they might be safely kept as aforesaid, was at least $1,000; whereas the expense of dividing and separating the logs which the said sheriff actually got, if the defendant had not interfered as aforesaid, would only have been about $60.00. That the difference between these two sums, to wit, the sum of $940, is the amount expended by said sheriff in endeavoring under his said writ to separate and safely keep the logs wrongfully taken and converted by the defendant as aforesaid, and the increased expense in separating and keeping them, the said quantity of 158,364 feet, over and above what such expense would have been had

not the defendant wrongfully and maliciously endeavored to prevent the said sheriff from taking said quantity.

Wherefore the plaintiffs demand judgment against the defendant for the sum of $28,320.00, being treble the damages aforesaid, with interest from the 24th day of April, 1876, together with the costs and disbursements of this action, and such other relief as may be just and equitable.

HASTINGS & GREENE AND
JOHN J. TRACY, *Pl'ffs' Att'ys.*

12 BROWN COUNTY, *ss:*

P. W. Geekie and Wm. Klass, being each severally duly sworn, says, each for himself, that he is one of the plaintiffs in the foregoing entitled action, and has heard read the foregoing complaint, and knows its contents thereof, and that the same is true of his own knowledge, except to the matters therein stated on information and belief, and as to those matters he believes it to be true.

P. W. GEEKIE.
WM. KLASS.

Subscribed and sworn to before me this 21st day of Nov., 1876.
JOHN J. TRACY,
Notary Public, Wis.

Demurrer.

The State of Wisconsin. The circuit court for Oconto County.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wisconsin, & William Klass, plaintiffs,
ag'st
THE KIRBY CARPENTER COMPANY, DEFENDANT.

The defendant demurs to the complaint of the plaintiffs herein, and for the grounds of its demurrer states, that it appears upon the face of the complaint that the said complaint does not state facts
13 sufficient to constitute a cause of action.

B. J. BROWN, *Def't's Att'y.*

Petition for removal.

State of Wisconsin, circuit court, Oconto County.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wis., & William Klass, plaintiffs.
against
THE KIRBY CARPENTER COMPANY, DEFENDANT.

To the honorable the circuit court of the State of Wisconsin, in and for the county of Oconto:

The petition of The Kirby Carpenter Company, the above-named defendant respectfully shows: That the above-entitled action is one of a civil nature, at law, now pending in said court; that the matter in dispute therein exceeds, exclusive of costs, the sum of five hundred dollars, that your petitioner is a corporation, created, organized, and existing under and by virtue of the laws of the State of Illinois, and has its

principal place of business in the city of Chicago in said State, and at the time said action was commenced was and now is a citizen of said State of Illinois, and the plaintiffs in said action are, and each of them at the time said action was commenced, was and now is a citizen of the State of Wisconsin.

14 Your petitioner therefore prays that the said action may be removed into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court. And your petitioner will ever pray, &c.

Dated March 31, 1877.

THE KIRBY CARPENTER COMPANY,
Defendant.
By B. J. BROWN, *its Attorney.*

STATE OF WISCONSIN, *Oconto County:*

Benjamin J. Brown, being duly sworn, says that he is the attorney for the above-named defendant and petitioner, and makes this affidavit in behalf of said petitioner. Affiant further says that he has heard read the foregoing petition and knows the contents thereof, and verily believes the same to be true; and also believes that no principal officer of said petitioner is now within the limits of the State of Wisconsin, but said officers are at the city of Chicago, in the State of Illinois.

BENJ. J. BROWN.

Subscribed and sworn to before me this 7th day of April, A. D. 1877.
WM. S. BAKER,
Notary Public, Oconto, Wis.

15 *Bond on removal.*

State of Wisconsin, circuit court, Oconto County.

P. W. GEEKIE, SHERIFF, &C., ET. AL., PL'FFS,
vs.
THE KIRBY CARPENTER COMPANY, DEFT.

We, Isaac Stephenson, of the town of Marinette, Oconto County, in the State of Wisconsin, and Fred. Carney, of the same place, in the State of Wisconsin, are held and firmly bound unto the above-named plaintiffs, P. W. Geekie, as sheriff of Oconto County, Wisconsin, and William Klass, in the sum of five hundred dollars lawful money of the United States of America, to be paid to the said plaintiffs, their heirs or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, dated this 7th day of April, A. D. 1877.

Whereas the above-entitled action is now pending in said court, and The Kirby Carpenter Company, the defendant therein, herewith files its petition in said action for the removal of said cause into the circuit court of the United States for the eastern district of Wisconsin: Now, therefore, the condition of the above obligation is such, that if the said

16 The Kirby Carpenter Company shall enter said circuit court of the United States for said eastern district of Wisconsin, at its next session, on the first day thereof, a copy of the record in the above-entitled action, and shall pay all costs that may be awarded by

said circuit court of the United States, if said court shall hold that said action was wrongfully or improperly removed thereto, and shall do or cause to be done such other appropriate acts as are required to be done upon a removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue.

ISAAC STEPHENSON. [SEAL.]
FRED. CARNEY. [SEAL.]

In presence of—
WM. S. BAKER.

STATE OF WISCONSIN,
Oconto County, ss:

Isaac Stephenson and Fred. Carney, of the town of Marinette, in said county, being severally duly sworn, doth each for himself depose and say that he is one of the obligors in the above obligation, and that he executed the same freely and voluntarily for the purposes therein mentioned; that he is a resident of the said State of Wisconsin, and is worth the sum of five hundred dollars over and above his just debts and liabilities, exclusive of property exempt by law from execution.

ISAAC STEPHENSON.
FRED. CARNEY.

Subscribed & sworn to before me this 7th day of April, A. D. 1877.
WM. S. BAKER,
Notary Public, Oconto Co., Wis.

17 *Order for removal.*

Circuit court, Oconto County, April term, 1877.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wis., & William Klass, plaintiffs,
against
THE KIRBY CARPENTER COMPANY, DEFENDANT.

The above-named defendant having, on this 9th day of April, in the year 1877, filed the requisite petition and bond for the removal of the above-entitled action into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute of the United States in such case made and provided, it is ordered that said petition and bond be, and the same are hereby, accepted; and it is further ordered that no further proceedings be had in said action in this court.

April 9th, 1877.
By the court:

E. H. ELLIS, *Circ't Judge.*

Clerk's certificate.

STATE OF WISCONSIN,
Oconto County, ss:

OFFICE OF THE CLERK OF THE CIRCUIT COURT, OCONTO, WIS.,
Oconto, July 7th, 1877.

I, Charles Hall, clerk of the circuit court for said county of Oconto, State of Wisconsin, do hereby certify that the annexed is a true copy

of the original record and files in a certain cause commenced in said court, wherein P. W. Geekie, sheriff of Oconto County, Wisconsin, and William Klass, are plaintiffs, and The Kirby Carpenter Company is defendant, now on file and of record in my office; that I have carefully compared said copy with the originals, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and the seal of said court, at Oconto, in said county, the day & year above written.

[SEAL.] CHAS. HALL, *Clerk.*

Demurrer to complaint submitted.

And same day (July 10, 1877) came the parties by their counsel, Mr. Tracy appearing for the plaintiffs, and submitted the demurrer of the defendant to the plaintiffs' complaint, with leave to the defendant to submit a written brief within twenty days, the plaintiffs to submit a brief on their behalf within five days thereafter, and the defendant to reply to same in five days thereafter.

Order overruling demurrer.

OCTOBER 1, 1877.

This day came the parties, by their counsel, and on consideration of the demurrer to the complaint, it is ordered by the court that the said demurrer be, and hereby is, overruled, with leave to the defendant to serve and file his answer within thirty days.

DECEMBER 4, 1877.

This day came the defendant, by its attorney, Mr. B. J. Brown,
19 and filed its answer, as follows:

Answer.

Circuit court of the United States for the eastern district of Wisconsin.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wis., & William Klass, plaintiffs,
ag'st.
THE KIRBY CARPENTER COMPANY, DEFENDANT.

The answer of the defendant to the complainant herein shows to the court:

1st. The defendant admits that on or about the 15th day of March, 1876, there was 1,198,602 feet of pine saw logs, marked as stated in the complaint, lying in the waters of the Menominee River, in the county of Oconto, and State of Wisconsin; but this defendant has no knowledge or information sufficient to form a belief that there was any greater quantity thereof, and cannot therefore admit, but on the contrary it denies that there was 1,259,310 feet of said logs, or any greater amount than hereinbefore admitted; and this defendant denies that the said William Klass was on the 15th day of March, 1876, or at any other time, the owner of said saw-logs or any part thereof, but avers that the same then were, and ever since have been, the property of this defendant.

20 This defendant further says that it has no knowledge or infor-

mation sufficient to form a belief as to the truth of any of the allegations of the complaint respecting the proceedings upon which a writ of attachment was issued out of the circuit court of Oconto County, Wisconsin, at the suit of the above-named Joseph Laev as plaintiff against the above named William Klass as defendant, or of the contents of said writ; or that said writ was delivered to the above-named P. W. Geekie, as sheriff of said county, for service, or that said Geekie as such sheriff, by virtue of said writ, on the 24th day of April, 1876, or at any other time, levied upon or attached any of the logs mentioned in the complaint; or that said logs on the day last aforesaid, were at the place in said complaint stated. This defendant has no knowledge or information sufficient to form a belief that the said sheriff requested the Menominee River Manufacturing Company to let the logs alleged to have been levied upon by said sheriff pass through the boom or booms of said company, as stated in the complaint, or that said company refused or neglected to comply with such request, but this defendant denies that such neglect and refusal, if any such there were, was occasioned by the fraudulent or wrongful procuration of this
21 defendant, or with its wrongful connivance.

This defendant admits that some persons to this defendant unknown, acting under the authority and dircetion of said sheriff and one Millard F. Powers as his deputy or under sheriff, did divide and separate some of said logs from other logs floating down said river, but this defendant avers, upon information and belief, that the said logs were so separated and divided within the State of Michigan, and not within the State of Wisconsin.

This defendant admits that the sheriff of Menominee County, Michigan, in the execution of the writ of replevin hereinafter mentioned, employed to that end a large force of men, and that this defendant, who was the plaintiff in that suit, furnished to said sheriff men for that purpose, but, save as aforesaid, this defendant denies all the allegations which are contained in the paragraph commencing in the 14th folio of said complaint and ending in the 15th folio thereof; and also in the paragraph commencing in the 15th folio of said complaint and ending in the 17th folio thereof.

This defendant admits that the said P. W. Geekie, sheriff of Oconto County, Wisconsin, was only able to separate and keep a portion of said logs, and that he did separate and keep 158,364 feet thereof,
22 but, save as aforesaid, this defendant denies all the allegations which are contained in the paragraph commencing in the 17th folio of said complaint and ending in the 18th folio thereof.

This defendant denies that said saw logs were or are of the value of eighty-five hundred dollars.

This defendant further says that it has no knowledge or information sufficient to form a belief as to the truth of any of the allegations of the complaint which are contained in the paragraph commencing in the 18th folio of said complaint and ending in the 20th folio thereof.

2nd. This defendant further answering says that on the 31st day of May, in the year 1876, a writ of replevin was issued out of and under the seal of the circuit court for the county of Menominee and State of Michigan, directed to the sheriff of said county of Menominee, commanding him forthwith to take into his custody the goods and chattels therein mentioned, to wit, four thousand five hundred pine saw-logs, marked as follows, to wit, on the side with three notches or hacks in two different places, and on the end with a so-called double-barred O, thus ⊕, and now in the Menominee River, and deliver the same to the

Kirby Carpenter Company, plaintiff therein, and who is the defendant herein, if it should give him the security required by law to pros-
23 ecute to effect the said suit against Menominee River Manufacturing Company, Charles J. Ellis, and Millard F. Powers, defendants therein, and to return the aforesaid goods and chattels, if return thereof should be adjudged, and to pay all such sums of money as may be recovered against it thereupon; and also to summon the said Menominee River Manufacturing Company, Charles J. Ellis, and Millard F. Powers to appear before the circuit court of the said county of Menominee on the 1st day of August, A. D. 1876, to answer the said The Kirby Carpenter Company concerning the unlawful detention of the said goods and chattels.

That Samuel M. Stephenson made and annexed to said writ the affidavit required by law, and thereupon and thereafter the said writ was delivered to the sheriff of said county of Menominee for service. That said writ, as this defendant is informed and believes, was duly and personally served upon all of the defendants therein named within the said county of Menominee and State of Michigan.

This defendant further avers, upon information and belief, that Millard F. Powers, one of the defendants named in said writ, was, at the date of the issuing of the said writ and the service thereof upon him, under sheriff or deputy sheriff of the county of Oconto and State
24 of Wisconsin, and that as such deputy or under sheriff he then had in his hands for service the writ of attachment mentioned and set forth in the complaint, and that said sheriff of the county of Menominee seized and took into his custody under said writ of replevin fourteen hundred and sixty-two of said logs therein described, and while the same, as this defendant is informed and believes, were floating in the waters of the State of Michigan, and delivered the same to this defendant, the plaintiff in said writ, it having given the bond required by law, which logs, so delivered to it as aforesaid, this defendant avers were a part of the logs mentioned and described in the complaint, and that, including said logs so delivered to this defendant by the sheriff of Menominee County, Michigan, this defendant came into the possession, after the date of said writ, and before the commencement of this action, and while the same were floating in the waters of the State of Michigan, of 4,415 of the logs mentioned in the said writ of replevin and in the complaint herein, containing 1,040,238 feet. That these acts are the same of which the plaintiffs complain.

B. J. BROWN,
Def't's Att'y.

L. S. DIXON,
Of Counsel.

25 UNITED STATES OF AMERICA,
State of Michigan, Menominee County, ss:

Samuel M. Stephenson, of said county, being duly sworn, says that he is the secretary of the Kirby Carpenter Company, the above-named defendant; that he has heard read the foregoing answer, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the defendant, and as to those matters he believes it to be true.

S. M. STEPHENSON.

Subscribed and sworn to before me this 23rd day of November, 1876.
[SEAL.] CHARLES E. AIKEN,
Notary Public, Menominee Co., Mich.

JULY 9, 1878.

This day came the parties, by their counsel, and upon application of the defendant for a continuance of this cause upon affidavits filed, it is ordered by the court that this cause be, and hereby is, continued at the costs of the defendant.

And afterwards, to wit, at a stated term of said court, begun and held according to law, at the city of Milwaukee, on the first Mon-
26 day (being the seventh day) of October, A. D. 1878, and on the forty-first day of said term, to wit, on the third day of December, A. D. 1878, present and presiding the honorable Charles E. Dyer, district judge, the following proceedings were had, to wit:

Trial.

PETER W. GEEKIE, SHERIFF OF OCONTO County, Wisconsin, & William Klass
vs.
THE KIRBY CARPENTER COMPANY.
} At law.

This day came the parties, by their counsel, Messrs. J. J. Tracy and S. D. Hastings, jr., appearing for the plaintiff, and Messrs. B. J. Brown and L. S. Dixon appearing for the defendant, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, M. L. Ayres, W. T. Brooks, Alfred Rolfe, Morgan L. Burdick, Elisha Pearl, Andrew Mitchell, W. P. Merrill, Nathan Brick, William N. Langton, E. T. Sercomb, D. M. Stearns, and G. D. Pearce, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-second day of said term,
27 to wit, on the fourth day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-third day of said term, to wit, on the fifth day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-fourth day of said term, to wit, on the sixth day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until to-morrow morning.

Kirby Carpenter Company, plaintiff therein, and who is the defendant herein, if it should give him the security required by law to pros-
23 ecute to effect the said suit against Menominee River Manufacturing Company, Charles J. Ellis, and Millard F. Powers, defendants therein, and to return the aforesaid goods and chattels, if return thereof should be adjudged, and to pay all such sums of money as may be recovered against it thereupon; and also to summon the said Menominee River Manufacturing Company, Charles J. Ellis, and Millard F. Powers to appear before the circuit court of the said county of Menominee on the 1st day of August, A. D. 1876, to answer the said The Kirby Carpenter Company concerning the unlawful detention of the said goods and chattels.

That Samuel M. Stephenson made and annexed to said writ the affidavit required by law, and thereupon and thereafter the said writ was delivered to the sheriff of said county of Menominee for service. That said writ, as this defendant is informed and believes, was duly and personally served upon all of the defendants therein named within the said county of Menominee and State of Michigan.

This defendant further avers, upon information and belief, that Millard F. Powers, one of the defendants named in said writ, was, at the date of the issuing of the said writ and the service thereof upon him, under sheriff or deputy sheriff of the county of Oconto and State
24 of Wisconsin, and that as such deputy or under sheriff he then had in his hands for service the writ of attachment mentioned and set forth in the complaint, and that said sheriff of the county of Menominee seized and took into his custody under said writ of replevin fourteen hundred and sixty-two of said logs therein described, and while the same, as this defendant is informed and believes, were floating in the waters of the State of Michigan, and delivered the same to this defendant, the plaintiff in said writ, it having given the bond required by law, which logs, so delivered to it as aforesaid, this defendant avers were a part of the logs mentioned and described in the complaint, and that, including said logs so delivered to this defendant by the sheriff of Menominee County, Michigan, this defendant came into the possession, after the date of said writ, and before the commencement of this action, and while the same were floating in the waters of the State of Michigan, of 4,415 of the logs mentioned in the said writ of replevin and in the complaint herein, containing 1,040,238 feet. That these acts are the same of which the plaintiffs complain.

B. J. BROWN,
Def't's Att'y.

L. S. DIXON,
Of Counsel.

25 UNITED STATES OF AMERICA,
State of Michigan, Menominee County, ss:

Samuel M. Stephenson, of said county, being duly sworn, says that he is the secretary of the Kirby Carpenter Company, the above-named defendant; that he has heard read the foregoing answer, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the defendant, and as to those matters he believes it to be true.

S. M. STEPHENSON.

Subscribed and sworn to before me this 23rd day of November, 1876.
[SEAL.] CHARLES E. AIKEN,
Notary Public, Menominee Co., Mich.

JULY 9, 1878.

This day came the parties, by their counsel, and upon application of the defendant for a continuance of this cause upon affidavits filed, it is ordered by the court that this cause be, and hereby is, continued at the costs of the defendant.

And afterwards, to wit, at a stated term of said court, begun and held according to law, at the city of Milwaukee, on the first Mon-
26 day (being the seventh day) of October, A. D. 1878, and on the forty-first day of said term, to wit, on the third day of December, A. D. 1878, present and presiding the honorable Charles E. Dyer, district judge, the following proceedings were had, to wit:

Trial.

PETER W. GEEKIE, SHERIFF OF OCONTO County, Wisconsin, & William Klass
vs.
THE KIRBY CARPENTER COMPANY.
} At law.

This day came the parties, by their counsel, Messrs. J. J. Tracy and S. D. Hastings, jr., appearing for the plaintiff, and Messrs. B. J. Brown and L. S. Dixon appearing for the defendant, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, M. L. Ayres, W. T. Brooks, Alfred Rolfe, Morgan L. Burdick, Elisha Pearl, Andrew Mitchell, W. P. Merrill, Nathan Brick, William N. Langton, E. T. Sercomb, D. M. Stearns, and G. D. Pearce, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-second day of said term,
27 to wit, on the fourth day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-third day of said term, to wit, on the fifth day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-fourth day of said term, to wit, on the sixth day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-fifth day of said term, to wit, on the seventh day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was ad-
28 journed until Monday morning next.

And afterwards, to wit, on the forty-sixth day of said term, to wit, on the ninth day of December, A. D. 1878, present the Hon. Charles E. Dyer, district judge, presiding, the following proceedings were had, to wit:

Verdict.

This day came the parties, by their counsel, and the trial of the issue herein was resumed, and the jurors of the jury aforesaid being charged by the court retired to their room, under the charge of a sworn officer, to consider of their verdict. And afterwards the said jurors of the jury came into court and rendered a special verdict in answer to the questions propounded by the court, said questions and the answers of the jury thereto being as follows, to wit:

1st. Did the defendant take, or cause to be taken, from the possession of the plaintiffs and convert to its own use the logs in question, or any part thereof?—Answer. Yes.

2nd. If you answer the preceding question in the affirmative, then when were said logs so taken from the possession of the plaintiffs?—Answer. On the 24th day of April, 1876.

3rd. What quantity of logs, if any, were so taken and converted to its own use by the defendant?—Answer. 1,040,238 feet.

4th. What was the value of the logs so taken and appropriated
29 by the defendant?—Answer. $6 per thousand feet.

5th. What number of said logs were cut from sec. 13, town. 33, range 22, in the county of Oconto, Wis.?—Answer. 25,000 feet.

6th. What was the amount of expenses necessarily incurred and paid by the plaintiff Geekie in endeavoring to retain possession of said logs?—Answer. $538.14.

7th. What number of days was the plaintiff Geekie necessarily engaged in attempting to keep possession of said logs, and what was the value of his services per day?—Answer. 49 days, at three dollars per day, $147.00.

8th. What number of days was M. F. Powers necessarily engaged in attempting to keep possession of said logs, and what was the value of his services per day?—Answer. 15 days, at three dollars per day, $45.00.

W. T. BROOKS,
Foreman.

And afterwards, to wit, on the forty-ninth day of said term, to wit, on the twelfth day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the plaintiffs, by their counsel, and moved the court, upon the special verdict of the jury, for judgment herein in their favor for the sum of six thousand nine hundred and seventy-one dollars and fifty-six cents, with interest at the rate of seven per cent. per annum from April 26th, 1876, which motion is as follows:

30 *Motion of plaintiffs for judgment.*

Circuit court of United States, eastern district of Wisconsin.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wisconsin, & William Klass, plaintiffs,
against
THE KIRBY CARPENTER COMPANY, DEFENDANT.

And now come the above-named plantiffs, by Hastings & Greene and John J. Tracy, their attorneys, and move the court upon the special verdict rendered herein by the jury on the 9th day of December, 1878, and on the records and evidence in said cause for judgment in favor of said plaintiffs and against said defendant, for the sum of six thousand nine hundred and seventy-one dollars and fifty-six cents ($6,971.56), with interest at the rate of seven per cent. per annum from April 26th, 1876, and costs.

Dec. 12, 1878.

HASTINGS & GREENE AND JOHN J. TRACY,
Plaintiffs' Att'ys.

And came the defendant's counsel and moved the court for judgment in its favor upon the special verdict of the jury, for reasons filed, as follows:

31 *Motion of defendant for judgment.*

United States circuit court, eastern district of Wisconsin.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wis., & William Klass, plaintiffs,
vs.
THE KIRBY CARPENTER COMPANY, DEFENDANT.

And now comes the defendant by B. J. Brown, its attorney, and moves the court for judgment in its favor upon the special verdict of the jury in this cause, and because in law the plaintiffs established no cause of action, and the defendant is entitled to such judgment in its favor.

B. J. BROWN,
Att'y for Def't.

And afterwards, to wit, on the sixty-first day of said term, to wit, on the fourth day of January, A. D. 1879, the following proceedings were had to wit:

Ordered by the court that the hearing upon the motions of both parties for judgment upon the verdict be continued until the January term.

Hearing of motions for judgment.

And now at this same term, to wit, January term, 1879, and on the sixty-fifth day thereof, to wit, on the fourth day of April, A. D.
32 1879; present, the circuit and district judges aforesaid, the following proceedings were had, to wit:

PETER W. GEEKIE, SHERIFF OF OCONTO County, Wisconsin, & WILLIAM KLASS *vs.* THE KIRBY CARPENTER COMPANY. } At law.

This day came the parties by their counsel, and the motions of both parties for judgment upon the special verdict of the jury came on to be heard, and were argued by Messrs. J. J. Tracy and S. D. Hastings, jr., for the plaintiffs, and by Messrs. B. J. Brown and L. S. Dixon, for the defendant, and the hearing not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the sixty-sixth day of said term, to wit, on the fifth day of April, A. D. 1879; present, the circuit and district judges aforesaid, the following proceedings were had, to wit:

This day came the parties by their counsel, and the hearing of the motions of both parties for judgment upon the special verdict of the jury was resumed, and being concluded, the court took the same under consideration.

33 And afterwards, to wit, on the seventy-seventh day of said term, to wit, on the 18th day of April, A. D. 1879; present, the said circuit and district judges, the following proceedings were had, to wit:

Judgment for defendant.

PETER W. GEEKIE, SHERIFF OF OCONTO County, Wisconsin, & WILLIAM KLASS, *vs.* THE KIRBY CARPENTER COMPANY. } At law.

This day came the parties by their counsel, and upon consideration of the motions of the respective parties for judgment upon the special verdict of the jury, and the arguments of counsel thereon, it is ordered by the court that judgment be entered in favor of the defendant, and that the motion of the plaintiffs for judgment in their favor be and hereby is overruled.

Whereupon it is considered and adjudged by this court now here that the plaintiffs take nothing by their writ, and that the said defendant do have and recover of the said plaintiffs, Peter W. Geekie, sheriff of Oconto County, Wis., and William Klass, the sum of one hundred and eighty-six dollars and two cents, its costs about its said defense in this behalf by it expended, and that it have execution therefor.

Judgment roll signed April 18th, A. D. 1879.

Costs $186.02.

EDWARD KURTZ,
Clerk.

JUNE 13, 1879.

34 This day came the plaintiffs and filed their bond in the penalty of one thousand dollars with S. A. Coleman and Joseph Laev as sureties, conditioned that the said plaintiffs shall prosecute a writ of error to effect, and answer all damages and costs if they fail to make their plea good. Which bond is approved by the district judge, and is as follows:

Bond for costs on writ of error.

Circuit court of the United States, eastern district of Wisconsin.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY Wisconsin, & William Klass, plaintiffs in error,
vs.
THE KIRBY CARPENTER COMPANY, DEFENDANT in error.

Know all men by these presents that we, P. W. Geekie, William Klass, and S. A. Coleman, and Joseph Laev, of the county of Oconto and State of Wisconsin, are held and firmly bound unto The Kirby Carpenter Company in the full and just sum of one thousand dollars, to be paid to said Kirby Carpenter Company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 14th day of May, A. D. 1879.

35 Whereas lately at a term of the United States circuit court for the eastern district of Wisconsin, in a suit depending in said court between P. W. Geekie, sheriff of Oconto County, Wisconsin, and William Klass, as plaintiffs, and The Kirby Carpenter Company, as defendant, judgment was rendered against said plaintiffs and in favor of said defendant on the 18th day of April, 1879, and the said plaintiffs have prosecuted a writ of error to the Supreme Court of the United States to reverse said judgment:

Now, therefore, the condition of this obligation is such that if the said P. W. Geekie and William Klass shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void else to remain in full force and virtue.

P. W. GEEKIE. [SEAL.]
WM. KLASS. [SEAL.]
S. A. COLEMAN. [SEAL.]
JOSEPH LAEV. [SEAL.]

Sealed and delivered in presence of—
ALEX. BRAJEAN.
A. G. SCHMAGER.

Approved by me June 13th, 1879.

CHAS. E. DYER,
Dist. Judge.

STATE OF WISCONSIN,
Oconto County, ss:

S. A. Coleman, being duly sworn, deposes and says that he is
36 one of the obligors in the foregoing bond; that he resides in the county of Oconto, and State of Wisconsin, and is worth more than five thousand dollars over and above all debts and exemptions in property not by law exempt from execution.

S. A. COLEMAN.

Sworn to and subscribed before me this 14th day of May, 1879.

ALEX. BRAJEAN,
Notary Public, Wis.

STATE OF WISCONSIN,
Oconto County, ss :

Joseph Laev, being duly sworn, deposes and says that he is one of the obligors in the foregoing bond; that he resides in the county of Oconto, and State of Wisconsin, and is worth more than five thousand dollars over and above all debts and exemptions, in property not by law exempt from execution.

JOSEPH LAEV.

Sworn to and subscribed before me this 14th day of May, 1879.
ALEX. BROJEAN,
Notary Public, Wis.

Whereupon it is ordered that execution be superseded, and a
37 writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

JUNE 28, 1879.

Bill of exceptions signed and filed as follows, to wit:

Bill of exceptions.

Circuit court United States, eastern district of Wisconsin.

P. W. GEEKIE, SHERIFF OF OCONTO COUNTY, Wis., & William Klass, pl'ffs,
vs.
THE KIRBY CARPENTER COMPANY, DEF'T.

Be it remembered that this action came on for trial before the Hon. C. E. Dyer, one of the judges of said court, and a jury, on the 4th day of December, 1878.

To support the issues on their part, the plaintiffs offered in evidence a tax deed from the State of Wisconsin and Oconto County to one S. A. Coleman, dated and acknowledged April 27, 1867, and the certificate of its record endorsed on the back of said deed, showing that the same was recorded in the office of the register of deeds for Oconto County, on said 27th day of April, 1867, in vol. 8 of deeds, page 164. Said deed was in the words and figures following, to wit:

To all whom these presents shall come, greeting:

38 Whereas S. A. Coleman, assignee, of Oconto County, has deposited in the office of the clerk of the county board of supervisors of the county of Oconto, in the State of Wisconsin, five certificates of R. L. Hall, treasurer of said county, whereby it appears (as the fact is) that the following-described pieces or parcels of land lying and being situated in the county of Oconto, to wit: Certificate No. 2238, southeast quarter of the northeast quarter of section thirteen (13) in town. thirty-three (33), of range twenty-two (22), containing forty acres, sold for two dollars and forty-eight cents; certificate No. 2239, northeast quarter of the southeast quarter of section thirteen (13), town. thirty-three (33), of range twenty-two (22), containing $39\frac{58}{100}$ acres, sold for two dollars and forty-three cents; certificate No. 2240, northwest quarter of northwest quarter of section fourteen (14), town. thirty-three (33), range twenty-two (22), containing forty acres, sold for two dollars and forty-three cents; certificate No. 2241, southwest quarter of northwest quar-

ter of section fourteen (14), town. thirty-three (33), of range twenty-two (22), containing forty acres, sold for two dollars and forty-three cents; certificate No. 2242, northwest quarter of the southwest quarter of section fourteen (14), town. thirty-three (33), range twenty-two (22), containing forty acres, sold for two dollars and forty-three cents;
39 were for the non-payment of taxes sold by R. L. Hall, treasurer of said county, at public auction at the village of Oconto, in the county of Oconto, on the 12th day of May, in the year of our Lord one thousand eight hundred and sixty-three, to the said Oconto, and by its treasurer assigned to S. A. Coleman for the sum of twelve dollars and twenty cents in the whole; which sum was the amount of taxes assessed and due and unpaid on said tracts of lands, together with the costs and charges of such sale, due therewith at the time of making such sale, the whole of which sum of money has been paid by the aforesaid purchaser; and whereas it further appears (as the fact is) that the owners or claimants of said lands have not redeemed from said sale the lands which were sold as aforesaid, and said lands are now unredeemed from such sale, whereby said described lands have become forfeited, and the said purchaser, his heirs and assigns, are entitled to a conveyance thereof:

Now, therefore, know all men by these presents, that the county of Oconto, in said State, and the State of Wisconsin, in consideration of the said money aforesaid, and the premises, and in conformity to law, hath and hereby doth give, grant, and convey the tracts of land above described together with the hereditaments and appurtenances,
40 to the said S. A. Coleman, and to his heirs and assigns, to his sole use and benefit forever.

In testimony, whereof I, Bernard G. Grunert, the clerk of the county board of supervisors of the county of Oconto, have executed this deed, pursuant to and in virtue of the authority in me vested by the statutes of the State of Wisconsin, and for and on behalf of the said State, and of the county of Oconto aforesaid, and have hereunto subscribed my name officially and affixed the seal of the said county board of supervisors, at Oconto, in said county of Oconto, this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL.] BERNARD G. GRUNERT.
Clerk of the County Board of Supervisors.

Done in presence of—
JOHN B. FAIRCHILD,
R. W. HUBBELL.

[50-cent. U. S. inter. revenue stamp.]

STATE OF WISCONSIN;
County of Oconto, ss:

Be it remembered, that on this twenty-third day of April, A. D. 1867, on behalf of Oconto county and the State of Wisconsin, personally came before me, Bernard G. Grunert, clerk of the county board of supervisors, to me known to be the person so described in the foregoing instrument, and acknowledged that the same was executed
41 freely and voluntarily, for the uses and purposes therein mentioned.

JOHN B. FAIRCHILD,
Notary Public, Oconto Co., Wis.

Recorded at 5 o'clock p. m. April 27, 1867.

M. H. ROWLEY,
Register.
By B. G. GRUNERT,
Deputy.

The certificate of its record, endorsed on the back of said deed, was as follows:

Register's office, Oconto County.
Recorded Ap'l 27, 1867, at 5 p. m., in vol. 8 of deeds, page 164.
[SEAL.] M. H. ROWLEY, *Reg.*
By B. G. GRUNERT, *Dep.*

The defendant, by its counsel, objected to the reception of said deed in evidence. First, because said deed was not substantially in the form prescribed by statute, or any equivalent form. Second, because said deed was not executed and acknowledged as required by law. Third, because said deed was void upon its face.

The court reserved its rulings on said objections, and received said deed and certificate in evidence, subject to said objections.

The plaintiffs then offered in evidence a certified copy of the record of said deed, certified by the register of deeds for said Oconto
42 County, showing that said deed was recorded on said 27th day of April, 1867.

The defendant, by its counsel, made the same objections to the reception of said copy as to said deed, and the same ruling was made by the court.

The plaintiffs then called William Klass and other witnesses, whose testimony showed:

1st. That said William Klass purchased from said S. A. Coleman, the grantee in said tax deed, the pine timber standing on the premises described in said deed.

2nd. That all of the logs in controversy in this action were cut by said Klass from said premises during the winter of 1875 & 1876, and put into the Menominee River, and driven to a point about one mile above the dividing piers near the mouth of said river.

3rd. That said premises remained vacant and unoccupied during the whole of the three years next after the recording of said tax deed.

4th. That one Joseph Laev, a merchant residing in Oconto County, on and between the 21st day of November, 1875, and the 1st day of April, 1876, furnished said Klass with supplies for, and which were used by, his men and teams in camp while cutting, hauling, and driving said logs, to the amount and value of $1,665.78.

5th. That said Laev, prior to the 24th day of April, 1876, duly
43 filed in the office of the clerk of the circuit court for Oconto County, Wisconsin, his petition for a lien upon said logs for the amount of his said claim for said supplies, which was due and unpaid; and on said 24th day of April, 1876, commenced an action in said court against said Klass for the recovery of said amount and costs, and that a writ of attachment was issued in said action, directed to the sheriff of Oconto County, Wisconsin, commanding him to levy upon and hold said logs for the payment of such judgment as may be obtained in said action, and placed in the hands of said sheriff on said day.

6th. That on said 24th day of April, 1876, said sheriff, by and through M. F. Powers, his under sheriff, levied upon said logs at the place where

they were then lying in the Menominee River, about one mile above said dividing piers.

7th. That, including said logs, there were about one hundred million feet of logs in said river immediately above said dividing piers, and that all of said logs had to be run through and divided at said piers.

8th. That said dividing piers were managed and controled by a corporation, The Menominee River Manufacturing Company.

9th. That for some days after said logs were levied upon under said writ of attachment said under sheriff, Powers, remained in charge
44 of them, and then turned said writ over to said P. W. Geekie, the sheriff of said county, on or about May 9, 1876. But no evidence was given on the trial tending to show that the defendant had notice that said writ was turned over to said sheriff.

10th. That said defendant claimed to own said logs, and sought to take them from the custody, under said writ, of said sheriff, as they passed through said dividing piers.

11th. That from the time said logs commenced running through said dividing piers until they had all passed through, said plaintiff Geekie, and others acting for and under him, were struggling for the possession of said logs as they passed through said dividing piers, against parties acting for and under the direction of the defendant, who were also struggling for the possession of said logs.

12th. That the said Menominee River runs between the States of Michigan and Wisconsin.

13th. That when said logs were levied upon by said sheriff they were in a bend in said river, and on the Wisconsin side of the channel.

14th. That the expense of executing said writ of attachment by said sheriff, if he had not been interfered with by said defendant, would have been not more than $240.

45 Testimony was also given tending to show the value of said logs; the time and manner of the defendant's interference with and taking possession of them, and the extra expense necessarily incurred and paid by said sheriff in endeavoring to retain possession of said logs under his said writ of attachment, and the value of the services of said sheriff and under sheriff in that behalf.

The plaintiffs then rested their case.

To support the issues on its part, said defendant offered to show by certified copies of the records from Oconto County that the county treasurer of Oconto County, in making the sale of the lands on which said tax deed to Coleman was based, added to the amount of all legal taxes and charges for which each of said tracts were liable to be sold the sum of five cents, to pay for a United States revenue stamp to be placed on the certificate issued to the purchaser on such sale, and that said illegal excess of five cents was included in the amount for which each one of said tracts were sold by said treasurer; and that a five-cent U. S. internal revenue stamp was affixed to each one of the
46 said certificates of sale issued by said county treasurer.

The said plaintiffs, by their attorneys, objected to the reception to said evidence, as incompetent and immaterial, because said tax deed was regular and valid on its face, and had been recorded more than three years before the commencement of this action and the cutting of said timber.

The court reserved its ruling on said objection until the close of the case, and received said testimony subject to said objection.

It was then admitted by said plaintiffs, by their attorneys, that the facts relative to said sale were as said defendants offered to show them

to be, but not waiving their objection to said evidence or consenting to its being received in evidence.

The defendant then introduced evidence which showed—

1st. That said defendant was the owner of the premises from which said timber was cut, in fee simple, at the time said tax deed to Coleman was executed and recorded.

2nd. That the point in said Menominee River at which said dividing piers are located, and at which said defendant took from said Geekie said logs, was on the Michigan side of the main channel of said river.

47 The defendant, by its counsel, then offered in evidence a certified copy of the judgment roll and judgment in action in the circuit court for Menominee County, Michigan, in which the said defendant, The Kirby Carpenter Company, was plaintiff, and the Menominee River Manufacturing Company, Charles J. Ellis, and Millard F. Powers were defendants, in which action a writ of replevin was issued to the sheriff of said county, commanding him to forthwith take into his custody the goods and chattels therein mentioned, which were the logs in controversy, and deliver them to said Kirby Carpenter Company, which action was commenced on the 31st day of May, 1876, and process therein served on said parties therein named as defendants on said day, and in which action judgment was entered as by default against the defendants therein named on the 24th day of September, 1878, adjudging the title to said logs to be in said Kirby Carpenter Company.

The said plaintiffs, by their attorneys, objected to the reception of said record in evidence, as incompetent and immaterial, because neither of the plaintiffs in this action were parties to said action.

The court reserved its ruling upon said objection, and received
48 said testimony subject to said objection.

The defendant then offered further testimony that showed—

1st. That the Millard F. Powers named as one of the defendants in said action in the circuit court for Menominee County, Michigan, was the under sheriff of Oconto County.

2nd. That process in said action was served on said Powers on an island in the Menominee River, near its mouth, on the Michigan side of the main channel of said river, near the head of which island are situated the said dividing piers; and that at the time of the service of said process upon said Powers he was on said island assisting said Geekie in his endeavors to retain said logs under said writ of attachment under which they were levied on by said Powers.

3rd. That all of said logs that were taken from said plaintiffs, after the issuing of said writ of replevin, were taken by said sheriff and his posse, acting under the authority of said writ.

4th. That not to exceed twenty of said logs came to the possession of said defendant before the issuing of said writ of replevin.

49 The defendant then offered receipt showing payment of taxes by said defendant upon the lands from which said logs were cut for two years subsequent to the date of said tax deed to said Coleman.

The plaintiffs, by their counsel, objected to the reception of said evidence as incompetent and immaterial. The court overruled said objection. To which ruling the plaintiffs then and there duly excepted.

Further testimony was introduced by said defendant, tending to show the value of said logs, the time of their conversion by the defendant, and the manner in which they were taken possession of by the defendant and the sheriff of said Menominee County.

The defendant then rested its case; and the court thereupon sub-

mitted to the jury certain questions to be answered by them in the form of a special verdict. The jury thereupon retired, and afterwards returned into court with a special verdict on the 9th day of December, 1878.

Both said plaintiffs and said defendant filed motions for judgment on the pleadings, records, and evidence in said cause; and upon the argument of said counter motions and said objections to testimony reserved, the court overruled said defendant's objections to the admissi-
50 bility of said tax deed in evidence, and said plaintiffs' objection to said defendant's testimony showing the illegal excess of five cents in the amount for which each of said tracts of land were sold by said county treasurer, and overruled said plaintiffs' motion for judgment, and ordered judgment for said defendant.

To each of which said rulings against said plaintiffs said plaintiffs then and there duly excepted.

And because the foregoing matters do not appear of record in said cause, I have, at the request of said plaintiffs' attorneys settled and signed this bill of exceptions this 28th day of June, 1879.

CHARLES E. DYER, *Judge.* [SEAL.]

51 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a full and complete transcript of the record and proceedings in the case of Peter W. Geekie, sheriff, &c., et al., vs. The Kirby Carpenter Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th.

[SEAL.] EDWARD KURTZ, *Clerk.*

52 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America, for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Peter W. Geekie, sheriff of Oconto County, Wisconsin, and William Klass, plaintiffs, and The Kirby Carpenter Company, defendant, a manifest error hath happened, to the great damage of the said Peter W. Geekie, sheriff of Oconto Co., Wis., and William Klass, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second

Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 103rd.

EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n District of Wisconsin.

53 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] To The Kirby Carpenter Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein Peter W. Geekie, sheriff of Oconto County, Wisconsin, and William Klass are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in said district, this 13th day of June, A. D. 1879, and of the Independence of the United States the 103rd.

CHAS. E. DYER, *Judge.*

I accept service of the above citation this 30th day of August, A. D. 1879.

L. S. DIXON,
Of Counsel & Att'y for Def'ts.

(Indorsement on cover:) No. 93. Peter W. Geekie, sheriff of Oconto County, Wisconsin, and William Klass, plaintiffs in error, vs. The Kirby Carpenter Company. E. Wisconsin C. C. U. S. Filed 17th October, 1879.

OFFICE SUPREME COURT U. S.
FILED
NOV 17 1882
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES,

(No. 93.)

OCTOBER TERM---A. D. 1882.

PETER W. GEEKIE, Sheriff of Oconto County, Wisconsin, and WILLIAM KLASS,

Plaintiffs in Error,

vs.

THE KIRBY CARPENTER COMPANY,

Defendant in Error.

Writ of Error to the Circuit Court of the United States, Eastern District of Wisconsin.

BRIEF FOR PLAINTIFFS IN ERROR.

SAMUEL D. HASTINGS, JR.
GEORGE G. GREENE,
ATTORNEYS FOR PLAINTIFFS IN ERROR.

GREEN BAY, WIS.
M. D. KIMBALL, PRINTER,
1882.

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Plaintiffs in Error,
vs.
THE KIRBY CARPENTER COMPANY,
Defendant in Error.

Writ of Error to the Circuit Court of the United States, Eastern District of Wisconsin.

BRIEF FOR PLAINTIFFS IN ERROR.

FACTS.

This action is brought to recover the value of a quantity of pine saw logs, taken by the defendant from the plaintiff's posession and converted by the defendant to its own use, and also certain expenses necessarily incurred by the plaintiff Geekie, in his endeavor to retain possession of the property.

The questions involved relate *first* to the title to the property; *second* to the plaintiff's right to recover the expense incurred in the effort to retain it.

The facts bearing upon the first question are these: The lands from which the logs in question were cut are situated in Oconto County, Wisconsin. On the 27th day of April 1867 they were owned by the defendant. On that day a tax deed for the premises was issued to one S. A. Coleman and duly recorded in the office of the register of deeds for said County. The premises remained wholly vacant and unoccupied during the three years next after the recording of the tax deed. Coleman sold the standing timber to the plaintiff Klass. Klass' title is the same as Coleman's and depends upon the validity of the tax deed. The Statutes of Wisconsin provide that "No action shall be commenced by the former owner or owners of any lands or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for non-payment of taxes, or to avoid such deed, unless such action shall be commenced within three years next after the recording of such deed." After excepting the case of a minor it continues, "nor shall such limitation apply where the taxes for the non-payment of which the land was sold and the tax deed issued, were paid prior to the sale or where the land was redeemed from the operation of such sale, as provided by law, nor where the land was not liable to taxation." *Ch.* 138. *Laws* 1861. §§ 5-6.—1 *Tay St.* 441-3. It has long been the settled construction of this Statute by the Supreme Court of Wisconsin that the limitation runs in favor of the grantee in the tax deed when it is valid on its face and the premises are not occupied, and that at the expiration

of the three years his title becomes perfect and unimpeachable; that the Statute does not effect the remedy but the right. The defendant attacked the plaintiff's title on three grounds: (1) that the deed was not in the form prescribed by Statute; (2) that it was not properly acknowledged; (3) that because in making the sale of the lands on which it was based the county treasurer added to the amount of all legal taxes and charges for which each of the several tracts were liable to be sold the sum of five cents, to pay for a United States Revenue Stamp to be, and which was, placed on the certificate issued to the purchaser on such sale, and such illegal excess was included in the amount for which each tract was sold, the case did not fall within the provisions of the Statute. All the facts were established by uncontradicted testimony, the admissions of the parties and the special verdict of the jury. Both parties moved for judgment on the special verdicts, record and evidence; and on such motions the circuit court held that the tax deed to Coleman was regular in form and properly acknowledged, but that because of the illegal excess of five cents being included in the amount for which the lands were sold, the case did not fall within the provisions of the Statute of limitations and gave judgment for the defendant.

As bearing on the second question the facts are these: Klass cut the logs from the premises in question during the winter of 1875-6, put them into the Menominee river, which runs between the States of Wisconsin and Michigan, and drove them to a point about one mile above the dividing piers near the mouth of said river. One Joseph Laev furnished to said Klass supplies for his logging operations to the amount and value of $1,665.78 for which, under the

Statutes of Wisconsin, he had a lien on the logs and a remedy for enforcing the lien by attaching the logs. 2 *Tay St.* 1768. April 24, 1876 Laev commenced an action against the plaintiff Klass to enforce his lien upon the logs, in which action a writ of attachment was issued to the Sheriff of Oconto County, the plaintiff Geekie, commanding him to levy upon and hold said logs, and on the same day, by and through his undersheriff M. F. Powers, Geekie, as such Sheriff, levied upon the logs in the river at the point to which Klass had driven them, which was in a bend on the Wisconsin side of the channel. Powers continued in charge of the property, under the writ and levy until May 9, 1876, when he turned over the writ and property to the Sheriff Geekie. Including the logs in question there were about 100,000,000 feet of logs in said river, all of which had to be run through and divided at said dividing piers, which were managed and controled by a corporation, the Menominee River Manufacturing Company. The defendant claimed to own the logs, and sought to take them from the possession of the Sheriff Geekie as they passed through the dividing piers. And from the time they commenced running until they had passed through the piers, Geekie and his assistants were struggling for the possession of the logs against parties acting for and under the directions of the defendant, who were also struggling for their possession. In consequence of this interference by the defendant the Sheriff Geekie necessarily incurred and paid expenses in endeavoring to retain possession of the logs to the amount of $490.14 more than the expenses of executing the writ would have been had he not been interfered with. The dividing piers and the point at which the defendant

took the logs from Geekie are on the Michigan side of the channel of the river. After the defendant had wrested from the Sheriff Geekie about twenty logs, it commenced an action in the Circuit Court for Menominee County, Michigan, making defendants said Menominee River Manufacturing Company, one Charles J. Ellis, and said M. F. Powers, in which action a writ of replevin was issued to the Sheriff of said county, commanding him to take into his custody said logs. This action was commenced by service of process on May 31, 1876 and judgment by default was entered September 24, 1876 adjudging the title to said logs to be in the defendant in error. Process was served on Powers on an island in the river on the Michigan side of the channel, while he was engaged in assisting Geekie in his endeavor to retain possession of the logs. All of the logs in question, except the twenty previously taken by the defendant, were taken from Geekie's possession by the Menominee County Sheriff and his assistants under said writ and delivered to the defendant. The special verdict finds that the quantity of logs taken and converted to its own use by the defendant was 1,040,238, valued at $6241.42, and that the conversion took place April 24, 1876.

ERRORS.

1st. The Circuit Court erred in holding that the tax deed to Coleman was not protected by the Statute of limitations.

2d. The Circuit Court erred in ruling that the

plaintiff in error Klass was not the owner of the logs in controversy.

3d. The Circuit Court erred in refusing to grant the plaintiff's motion for judgment upon the special verdict, evidence and record in the case.

4th. The Circuit Court erred in not ordering judgment for the plaintiffs for the value of the logs converted by the defendant as found by the jury, with interest from the date of conversion, and for the extra expense incurred by the plaintiff in error, Geekie, in his attempt to retain possession of said logs against said defendant with interest on said amount.

5th. The Circuit Court erred in granting the defendant's motion for judgment.

6th. The rulings of the Circuit Court were otherwise informal and erroneous.

POINTS AND ARGUMENT.

PLAINTIFF'S TITLE.

The plaintiffs in error showed a perfect title in Coleman to the premises from which the logs were cut.

I.

The decisions of the highest judicial tribunal of a state are binding on the Federal Courts, when they construe the constitution or local statutes of their State.

Smith vs. Kernochen 7 *How.* 198—219.

Nesmith vs. Sheldon 7 *How.* 812.

City of Richmond vs. Smith 15 *Wall.* 429.438.

Arcardi vs. State 19 *Wall.* 635.

Allen vs. Massey 17 *Wall.* 351.

Sweeney vs. Lomme 22 *Wall.* 208.

Township of Elmwood vs. Marcy. 92 *U. S.* 289.294

County of Leavenworth vs Barnes, 94 *U. S.* 70.

Peik vs. Ch. and N. W. R. R. Co. 94 *U. S.* 164.

Stone vs. Wisconsin 94 *U. S.* 181.

Town of South Ottawa vs. Perkins 94 *U. S.* 260.

Boyd vs. Alabama, 94 *U. S.* 645-649.

Fairfield vs. County of Gallatin, 100 *U. S.,* 47.

Especially is this rule rigidly adhered to by this Court, when the decisions of the State Court construe a statute of limitation, affecting the title to real estate.

Leffingwell vs. Warren, 2 *Black,* 599.

Haspending vs. Dutch Church, 16 *Peters,* 455, 493.

Henderson vs. Griffin, 5 *Peters,* 151.

Williams vs. Kertland, 13 *Wall,* 306.

Tioga R. R. Co. vs. Blossburg & Corning R. R. Co., 20 *Wall,* 137.

Lippencott vs. Mitchell, 94 *U. S.,* 770.

Webster vs. Cooper, 14 *How.* 296, 504.

Van Ransellaer vs. Kearney, 11 *How,* 297, 318.

McDowell vs. Peylon 10 *Wheaton* 454.

Thatcher vs. Powell 6 *Wheaton* 119.

United States vs. Fox 94 *U. S.* 315.

Townsend vs. Todd 91 *U. S.* 452.

Nichols vs. Levy 5 *Wall.* 433

Walker vs. State Harbor Comr's 17 *Wall.* 648.

If the same Statute is construed differently by the courts of different states, it is, as to the Federal Courts, a different law for each State.

Christy vs. Pridgeon 4 *Wall.* 196.

Shelley vs. Guy 11 *Wheaton* 367.

If the highest judicial tribunal of a state adopts new views as to the proper construction of such a statute, and reverses its former decisions, this court will follow the last settled adjudications.

Leffingwell vs. Warren 2 *Black* 599.

Green vs. Niel's Lessee 6 *Peters* 291.

Suydam vs. Williamson 24 *How.* 427.

In regard to commercial transactions and negotiable securities, an exception to this rule is, that when a state court changes its construction of a statute, and rights have been acquired under the former construction, the Federal courts will follow the former construction, so far as necessary to protect such rights.

Gelpcke vs. Dubuque 1 *Wall.* 175.

Supervisors vs. United States 18 *Wall.* 71.

Fairfield vs. County of Gallatin 100 *U. S.* 47.

Douglas vs. County of Pike 101 *U. S.* 677, 686

But such deference does the Federal courts pay to the decisions of the State courts establishing rules of law effecting titles to land, that no exception is made to the general rule in such cases, but the exception is to the other rule, that decisions of the

State Courts are not binding on Federal courts when they relate to questions of a general nature, not based on local Statute or usage, and the decision of the State Courts, though not based on local statutes, but affecting land titles, are followed by the Federal Courts.

In *Jackson vs. Chew* 12 *Wheaton* 162 Thompson J. says: "The rule has uniformily governed this Court, that where any principle of law, establishing a rule of real property has been settled in the State Courts, the same rule will be applied by this Court, that would be applied by the State tribunals. This is a principle so obviously just, and so indispensibly necessary, under our system of government, that it cannot be lost sight of." And in *Suydam vs. Williamson* 24 *How.* 427, this Court, although it had previously passed upon the title involved conforming its rulings to those of the highest Courts of New York, the same question again coming before it, reversed its former decision, following the later decisions of New York, by which it felt bound.

Where this Court has given a state statute a construction in advance, or in ignorance, of a decision by the State Court, it will reverse its decision and follow that of the State Court, when rendered or ascertained if not in harmony with its own:

Green vs. Neals Lessee 6 *Peters* 291.

County of Cass vs. Johnston 95 *U. S.* 360, 369, 371.

Fairfield vs. County of Gallatin, 100 *U. S.* 47.

Unless contracts have been entered into with citizens of other States on the faith of the decisions of this Court, in advance of the decision by the State Court, in which case

this Court will adhere to its construction, so far as to uphold the validity of such contracts—

Rowan vs. Runnels 5 *How.* 134.

Fairfield vs. Gallatin County 100 *U. S.* 47.

The construction given by the highest judicial tribunal of a state, to a statute of limitations of the state, will be followed by this Court in a case decided the other way in the Circuit Court before the decision of the State Court was announced.

Moores vs. Citizens Nat. Bank 13 *Repl'r* 481.—
14 *C. L. J.* 228 104 U.S. 625

Mr. Justice Gray, who writes the opinion of the Court, thus disposes of the question: "That decision (that of the Circuit Court under review,) was in accordance with an opinion of the majority of the the Superior court of Cincinnati in Ong. vs. Sumner 1, Cin. Sup. Ct. 424, which appears to have been the only decision upon the question in the Courts of Ohio at the time of the trial of the present case in the Circuit Court. But in Lawrence Railroad vs. Cobb 35 Ohio State 94, the Supreme Court of Ohio have since adjudged that, even if the Statute of 1870 withdrew the protection of coverture (a point which it did not decide) yet the action of a married woman was not barred until four years after the passage of this statute; and the construction thus given to the Statute by the highest Court of the State should be followed by this Court. 20 Wall 137, 93 U. S, 674, 100 U. S. 47. It follows that the order sustaining the demurrer to the plaintiff's first reply was erroneous, and that the judgment below

in favor of the defendant must be reversed, unless it clearly appears that the plaintiff was not prejudiced by the error."

Bailey vs. Magwire 22 *Wall.* 215, 230. Mr. Justice Davis, in giving the opinion of this Court in favor of reversal of the decree of the Circuit Court, refers to a recent decision of the Supreme Court of the State and says: "As it is the peculiar province of the highest Court of a State to decide whether or not the method pursued in the assessment and collection of taxes is in conformity with the law of the State, this decision is controlling. *It was not made until after this suit was instituted, and doubtless not promulgated, until the rendition of the decree.*"

State Rail Road Tax Cases 92 *U. S.* 575. 617

After the judgment of the Circuit Court and before this Court, the Supreme Court of Illinois had passed upon the questions involved. Mr. Justice Miller, in giving the opinion of this Court says: "But, if for no other reason, we should reverse the decrees of the Circuit Court in these cases, because the same questions, involving the same considerations urged upon us here, have been decided by the Supreme Court of the State of Illinois, in a manner which leads to the reversal of these" * * *. "As the whole matter thus concerns the validity of a State law, as affected by the constitution of the State, that question and the other one of the true construction of that Statute, belongs to the class of questions in regard to which this Court still holds with some few exceptions, that the decisions of the State Courts are to be accepted as the rule of decision for the Federal Courts."

In *Callanan vs. Hurley* 93 *U. S.* 387, a bill was filed in the Circuit Court to set aside a tax deed. The defendant sought to sustain his deed and title under the Iowa Statute of limitations. The Circuit Court granted the prayer of the complaint. Before the case was reached by this Court the Supreme Court of Iowa passed upon the same question, holding such a case within the protection of the Statute. This court followed the decision of the State Court and reversed the decree of the Circuit Court.

In *Atlantic and Pacific R. R. Co. vs. Hopkins* 94. *U. S.* 11, the Circuit Court put a construction on a provision of the Kansas Code of Practice, and made a certain order to which such construction entitled the defendant in error. After the order was made the Supreme Court of Kansas put a different construction on the Statute. In giving the opinion of this Court for reversal, Mr. Chief Justice Waite says: "As the practice in the Courts of the United States must conform as near as may be to that in the Courts of the State, these decisions construing the practice act of the State are binding upon the Courts of the United States. It follows that the Circuit Court erred," &c.

In *Township of East Oakland vs. Skinner* 94 *U. S.* 255, in reversing the judgment of the Circuit Court this Court refers to a decision of the State Court giving a construction to the Statute in question, made after judgment in the Circuit Court, and adverse to the decision of that Court as binding on this Court, although they also express their concurrence in the views of the State Court.

In numerous cases where the decision of the

State Court announced after the judgment of the Circuit has sustained that judgment this court has held it conclusive that the judgment of the Circuit Court was correct. A sample of such cases is *Kibbe vs. Ditto* 93 *U. S.* 674, 679.

Two cases are sometimes referred to as inconsistent with this position, *Pease vs. Peck* 18 *How.* 595, and *Roberts vs. Bolles* 101 *U. S.* 119.

Pease vs. Peck was a peculiar case. A statute of Michigan containing a certain clause had been published and acted upon, recognized by the legislature and construed as the law of the State according to its published letter, by both State and Federal Courts, for thirty years. As said by this court, "it had entered as an element into the contracts and business of men. On a sudden a manuscript statute, differing from the known public law, is disinterred from the lumber room of obsolete documents; and a new law is promulgated by judicial construction, which by retroaction, destroys vested rights of property of citizens of other states, while it protects the citizens of Michigan from the payment of admitted debts." This new point was first raised in the United States Circuit Court, where it was held that the statute as published and recognized by the legislature and courts of Michigan, was the law, and this ruling was affirmed by a majority of this court, although the Supreme Court of Michigan, pending the appeal, had held that the clause was not a part of the statute. This opinion is based upon, and within the rule that this court will not allow a change of construction by State Courts to disturb vested rights acquired under a former construction.

In *Roberts vs. Bolles* this court refused to reverse the judgment of the Circuit Court on the ground that the intervening decision of the State Court did not pass upon the question involved. Mr. Justice Harlan, page 128, says in referring to that decision: "But we are not informed as to the effect which, in the opinion of that court, is to be given to the fifth section of the act of March 6th, 1867. If the court had gone further, and decided that section to be unconstitutional, etc., * * then its decision would have been authority in point covering the precise question before us."

III.

Turning now to the decisions of the highest judicial tribunal of the State of Wisconsin we find:

1st, That the exact question passed upon by the Circuit Court, in this case, was passed upon by the Wisconsin tribunal in the case of *Millidge vs. Coleman* 47 *Wis.* 184, decided September 2d, 1879, about four months after the judgment in this case, and that that tribunal holds the case within the statute of limitations, and the title of the grantee in the tax deed unimpeachable.

2d, That in *Millidge vs. Coleman* the court announce no new rule or doctrine, overrule or disregard no decision of that court, depart from no rule of real property established in that State, but follows its unvarying line of decisions construing the statute in question.

The court say "while the validity of the sale and conveyance is an open question, this illegal

excess, or any other irregularity in the tax proceeding might be shown in avoidance of the deed; but when the limitation has attached, the deed cannot be impeached on any such ground. *This is the view which has uniformly been taken of the statute by this court in the cases which have come before it; and to adopt now the construction contended for by the plaintiff's counsel would disturb numerous titles.*"

Again after quoting at length from the opinion of that court in *Oconto Company vs. Jerrard* 46 *Wis.* 317, decided March 4th, 1879, and which was cited on the argument of this case before the Circuit Court by counsel for the plaintiffs in error, as conclusive of this question—the court say: "No remarks could more satisfactorily meet and dispose of the argument on the statute of limitations, which was made in this case, than the above, and nothing need be added to them."

3d, We have in *Millidge vs. Coleman*, not only an authoritative construction of the statute, but an equally authoritative interpretation of the construction that has always prevailed and become a rule of property in Wisconsin. That construction as to the Federal Courts, becomes a part of the statute. If the decisions of the State Court construing the statute and the rule of property established by them are open to construction it is as much within the province of the State Courts to construe their own decisions and the rule of property established by them as it is to construe the original statute.

In *McKean vs. Delaney* 5 *Cranch* 22, this court followed what they understood to be the settled construction of a state statute on which land titles depended, taking, in the absence of a decision of the

State Court, that construction from an official act of a Justice of the State Supreme Court, consistent only with the assumed construction, and the statement of the Circuit Judge as to his understanding of it. Much more should this court be guided by the decision of the State Supreme Court that a certain construction of a state statute has always prevailed.

IV.

The construction of the statute, given in *Millidge vs. Coleman* is right, and the only one consistent with its language and object and the former decisions of the Wisconsin court.

(1)

It has always been the settled rule of that court that after a tax deed of lands lying within the territorial jurisdiction of the taxing officers regular on its face, has been recorded three years, with or without possession, or such a deed void on its face, with possession, and there has been no actual adverse possession by or under the former owner, the title becomes perfect in the grantee, unless the case falls within one of the exceptions mentioned in the statute.

Edgerton vs. Bird 6 *Wis.* 597.

Sprecker vs. Wakeley 11 *Wis.* 432.

Hill vs. Kirke 6 *Wis.* 442.

Leffingwell vs. Warren 2 *Black* 599.

Knox vs. Cleveland 13 *Wis.* 245.

Dean vs. Easley 15 *Wis.* 100.

Gunnison vs. Hoehne 18 *Wis.* 268.

Lawrence vs. Kenney 32 *Wis.* 281.

Oconto Company vs. Jerrard 46 *Wis.* 317.

Millidge vs Coleman 47 *Wis.* 184.

(2)

The statute containing its own exceptions, the courts cannot add to them.

In *Leffingwell vs. Warren*, Mr. Justice Swayne, speaking of this statute, says: "This case does not fall within either of these exceptions. We have no power to add to them. To do so would be to usurp the functions of another and distinct governmental department. It would be legislation and not adjudication."

Keeley vs. Sanders 99 *U. S.* 441–444.

Woodbury vs. Shackleford, 19 *Wis.* 55.

Lindsay vs. Fay 28 *Wis.* 177. The statute of limitations under consideration in that case excepted from its operation only cases where the taxes had actually been paid. The property was redeemed before the deed issued. The court held that a redemption from a sale was not a payment of the tax, and that the case was covered by the statute and not within the exception. They say: "To hold

otherwise would be to restrain the operation of the statute by 'arbitrary addition' which the rule of law prohibits."

Blackwell on Tax Titles 616.*

Scott vs. Hickox 7 *Ohio St.* 88 93.

(3)

The statute not excepting the case of a sale void for any other reason than non-liability to taxation and prior payment of the tax covers all other void sales, made by officers having jurisdiction over the subject matter of taxing and selling the lands, regardless of the ground of their invalidity.

In *Liffindwell vs. Warren*, when this statute was before this court twenty years ago, Mr. Justice Swayne said: "According to the rulings referred to, of the Supreme Court of the state, it is immaterial whether the sale and the deed be *void or valid.* It is sufficient that *a sale has been made*, and the deed recorded—to bring the statute into activity—and after the lapse of the period limited, to entitle the purchaser and those claiming under him, to its protection." [Page 605–6.]

In *Sprecker vs. Wakeley* 11 *Wis.* 432, it was held to cover a deed void on its face, showing that it was issued before the expiration of the time for redemption, and hence without jurisdiction.

In *Knox vs. Cleveland* 13 *Wis.* 245, it was held to cover the case of a sale for a larger portion of the tax than the property under the constitution could be charged with, resulting from the intentional omission from the tax roll of a large amount of property liable to taxation—the court holding that

such omission not only unlawfully added to the amount for which the land was sold, but rendered null and void the whole proceeding within the taxing district. Dixon, Ch. J., in speaking of the attempt to distinguish one ground of invalidity from another, says: "We can see no reasonable ground for distinguishing between them, or for saying that the purchaser must prove a regular levy of the taxes any more than that he must prove that any other step in the proceeding was regularly taken. The statute puts them all to rest or else none of them; and if none then it is useless. We understand that its object was to protect those who, without it, had no protection, and are unable to see how that object can be effectuated without excluding from the consideration of courts and juries all questions except those which concern the power and jurisdiction of the taxing officers, or the fraud and misconduct of the parties."

In *Whitney vs. Marshall* 17 *Wis.* 174, the sale of a lot assessed and sold jointly with other property owned by another party, was held within the statute, although such an assessment and sale is absolutely null and void. 20 *Wis.* 228, & *id.* 305.

In *Lindsay vs. Fay* 25 *Wis.* 460, a deed void on its face was held to be within the statute.

In *Lindsay vs. Fay* 28 *Wis.* 177, a deed issued after the land had been redeemed, and the whole superstructure and foundation upon which the tax proceedings rested thereby wiped out of existence, was held to be within the protection of the statute, the case of a redemption not being one of the exceptions contained in the statute.

A former statute of Wisconsin made a tax deed conclusive evidence of the regularity of all proceedings as soon as issued and recorded. The validity of this act was sustained on the ground that it was, in effect, a statute of limitation, as the deed could not issue until three years after the sale—thus placing the case on the same footing as a deed under the present statute that has been recorded three years. *Smith vs. Cleveland* 17 *Wis.* 556. In *Huey vs. Van Wie* 23 *Wis.* 613, it was attempted to defeat one of these deeds by showing that the sale was made for an unauthorized and illegal item, something that was not a tax. The court say: "The deed clearly concluded the plaintiff from showing that there was an excess in the amount of taxes for which the land was sold. By the statute it was conclusive evidence of the regularity of the tax proceedings."

In *Marsh vs. Supervisors* 42 *Wis* 502, *Philio vs. Hiles* 42 *Wis.* 527, *Schettler vs. Ft. Howard* 43 *Wis.* 48, and *Oconto Company vs. Jerrard, supra,* it was held that proceedings based on an illegal, unconstitutional assessment, were absolutely *null and void,* without jurisdiction in the officers, and not sufficient to create a tax, or a legal or equitable obligation to pay anything as a tax, and in *Plummer vs. Supervisors* 46 *Wis.* 163, it was held not to be within the power of the legislature to impart validity to such proceedings by curative acts. In speaking of these proceedings, Ryan, Ch. J., says: "This is not said of cases of mere irregularities. It is said of taxes levied for unlawful purposes, which create no duty to pay; and taxes apparently levied for lawful purposes, but not founded on constitutional assessments. *In these cases there is in law no tax.*" In *Oconto Company*

vs. Jerrard, supra, it was held that a deed based upon such absolutely *null* and *void* proceedings was within the protection of the statute.

' Can the statute have potency enough to protect a sale made wholly for that which is not and cannot be taxes, and which the property owner is under no legal or equitable obligation to pay, and not enough to cover a sale made for seventy-nine eightieth of legal taxes and one-eightieth of that which is not and cannot be made a legal tax.

The decision of the Wisconsin court in holding that the statute covers void sales is in harmony with those of this and all other courts.

Harlem vs. Peck 33 *Cal.* 515.

Holmes vs. Beal 9 *Cush* 223, 227.

(4)

The statute has always been regarded as a statute of repose.

In *Leffingwell vs. Warren,* Mr. Justice Swayne says: "Statutes of limitations are now regarded favorably in all courts of justice. They are statutes of repose. Usually they are founded in a wise and salutary policy, and promote the ends of justice."

Woodbury vs. Shackleford 19 *Wis.* 55.

The tax deed is presumptive evidence of the regularity and validity of all the proceedings. It is presumptive evidence that the sale was valid, that the amount for which the land was sold, included no improper or illegal items—that it did not include

five cents to pay for a stamp or any other illegal item.

In *Knox vs. Cleveland*, Dixon, Ch. J., says: "By delay, they have permitted what was before mere presumption to ripen into an absolute legal conclusion." And in *Oconto Company vs. Jerrard*, Ryan, Ch. J., says: "The statute makes a deed valid on its face *prima facie* evidence as soon as executed, of the regularity of all the proceedings from the assessment of the land inclusive, to the execution of the deed. And the effect of all the decisions is, that when the statute has run in favor of the grantee, *the deed becomes conclusive to the same extent.*"

Prior to April 27th, 1870, Coleman's tax deed was *prima facie* evidence of a valid sale of these lands, for a valid tax. It has been ever since that day and now is conclusive evidence of that fact.

When this exact question was presented to the Wisconsin Court in *Millidge vs. Coleman* they could say nothing less than that the case was clearly within the statute within the view uniformly taken of it in cases which had come before that court, and to adopt now the construction contended for by the learned counsel for the defendant in error here, who argued that case before them, would disturb numerous titles.

V.

The defendant's counsel seeks to take the case out of the operation of the statute by two processes of reasoning.

(1.) It is argued that the statute only includes sales for the non-payment of taxes—that because the five cents included in the amount for which the sale was made, *was not a tax,* but something for which taxes could not be raised, the land was not sold and conveyed for the non-payment of *taxes.* But it is conceded that of the $12.20 for which the land was sold, $12.05 represented valid legal taxes. And the argument amounts to this—having been sold for both A and B, it was not sold for A. But the logic is equally conclusive if we reverse it and say because it was sold for B and A, it was not sold for B. It was certainly sold for taxes, although the sale was void on account of the illegal excess included in the amount for which it was made.

(2.) It is next claimed, that, although the case falls within the letter of the statute, and not within any of the exceptions, it is yet not covered by it, because the whole proceeding was outside and beyond the jurisdiction of the taxing officers. This is not an exception mentioned in the statute itself, but recognized by the courts. The Wisconsin court say: "The only condition of things to which the statute will not apply is want of authority, *ab initio,* in the taxing officers to put the taxing power in motion. The general authority of the taxing officers and liability of the land to taxation being conceded, all other questions are at an end. If either of them are wanting, another question would be presented. It might then be urged that there was a defect of jurisdiction, that the sale was altogether unauthorized and void, and passed no title or color of title and furnished nothing upon which the statutary tax could operate."

This limitation was first suggested by Chief Justice Dixon in *Knox vs. Cleveland*, and by way of explanation of his meaning he refers us to *McKee vs. Lamberton* 2 *W. & S.* 144 and *Cramner vs. Hall* 4 *id.* 36. In the first of these cases, discussing the scope of a similar statute, Sargent, J., says: "In respect to seated lands there is *no jurisdiction* given to the assessor to charge the land itself with a tax; the remedy to recover the tax being against the owner or occupier personally. Nor is there any *jurisdiction* or *power* in the treasurer to sell such lands, *in any case whatever.*" After referring to certain cases cited, the judge continues, "In all these cases the land is unseated, the public officers have *jurisdiction over it to charge and sell,* * * * *But where the land is unseated there is no jurisdiction,* the whole proceedings are a nullity and no kind of title passes." In *Cramner vs. State,* the court say: "The provisions of these acts can only apply to sales of unseated lands, *where the assessor and commissioners have jurisdiction over the subject matter of the assessment and sale.*"

In *Oconto Company vs. Jerrard,* the court fully consider the scope of this exception to the operation of the statute, and reach the conclusion that if the land is within the taxing district whose officers assume to tax and sell it, and there are laws in existence authorizing it to be taxed and sold, it is within the power and jurisdiction of the taxing officers, and any sale made by such officers is within the protection of the statute.

In *Smith vs. Sherry* 54 *Wis.*, 114, this limitation was again under consideration, and it was held that the statute did not cover the case of the sale of land not lying within the taxing district.

There is no claim that this land was not within the taxing district, nor that there were not valid constitutional laws authorizing it to be taxed and sold.

Does the fact that there was no authority or power, or jurisdiction vested in the taxing officers to levy taxes to pay for U. S. revenue stamp, or to sell lands for the non-payment of such items, establish a want of authority, *ab initio*, of the taxing officers to put the taxing power in motion? It will hardly be so claimed. For if such is the case, whether or not they attempted to collect such an item or sell lands for its non-payment, all their proceedings would be null and void for want of authority to act at all. If then they have authority to put the taxing power in motion, does the fact that after they have done so, and are proceeding in the exercise of that power, they include an item among the taxes that they have no authority to include, operate to deprive them of the authority that they previously had, and were in the lawful exercise of—of all jurisdiction over the subject matter of the assessment and sale of the lands within their district? If so, there are but few tax titles protected by the statute of limitations, for including any item in the levy or amount for which the sale is made, intentionally or otherwise, not expressly authorized by statute and constitution, would have the same effect. An item exacted from a property owner by taxing

officers *without any statutary* authority is no more a tax than a similar item exacted *without any constitutional* authority. To be a tax it must not only be raised for a purpose for which taxes may be raised, but it must be expressly authorized by statute.

To distinguish this case, counsel select *only one* of the essentials of a tax as a test of what a tax is. His test is but one of many.

VI.

The two objections as to the form of the deed and acknowledgment, were both overruled by the Circuit Court. See opinion 11 Ch. Legal News 400. The same points were passed upon by the Wisconsin Court in *Millidge vs. Coleman*. That case is conclusive on this court that the rulings of the Circuit Court were correct. This is certainly so as to the form of the deed. Should this court regard the question as to the acknowledgment one of general law, not depending on any local statute, and examine it, it will find the ruling fully sustained by the following authorities :

Thurman vs. Loudon 13 *S. & R.* 386, 390.

Lofborough vs. Parker 12 *S. & R.* 48.

Carpenter vs. Dexter 8 *Wall.* 513.

Wilson vs. Henry 40 *Wis.* 597, 603.

McKean vs. Delaney's Lessee, 5 *Cranch* 22.

VII.

A word as to the equities of this controversy. Tax title controversies usually present the case of one party wresting from another possessions of great value for which he has paid but a few dollars. *Leffingwell vs. Warren* presented this feature with the additional one of a receipt in full by the county treasurer for all taxes on the land. A mistake, however, had been made, and a portion of the tax overlooked. Here are two hundred acres of wild lands in the Wisconsin pineries, which probably cost the defendant a dollar and a quarter an acre, or four hundred and fifty dollars. The plaintiff Klass, after Coleman had held the record title eight years, five years after the time allowed for the original owner to attack it, buys the stumpage, which ranged at that time at about one dollar per thousand feet, invests several thousand dollars in converting it into logs and running them to market. Of the $6,241.00 represented in those logs, fully five thousand are the property of Klass, which he must lose and the defendant gain should the defense in this case prevail.

PLAINTIFF'S RIGHTS.

I.

All the facts in the case being settled, on reversing the judgment of the Circuit Court, this court should not order a *venire de novo*, but should indicate by its decision what judgment should have been entered, and remand the case for further proceedings in accordance with the opinion. The Circuit Court erred as much in not giving the right judgment for

the plaintiffs as in giving a wrong judgment against them. See as indicating the practice,

Leffingwell vs. Warren, supra.

Dias Co vs Bryhin 12 Wall 433. 437-8. R.S.U.S. § 701

II.

The practice in Wisconsin requires only controverted questions of fact to be covered by special verdict. Facts admitted on the trial, or established by uncontradicted evidence, are considered in connection with those settled by the verdict, and the judgment should be in accordance with the rights of the parties on all the facts so established.

McNarra vs. Ch. & N. W. R. R. Co. 41 *Wis.* 69.

Hutchinson vs. Ch. & N. W. R. R. Co. 41 *Wis.* 541–553.

Williams vs. Porter 41 *Wis.* 422–430.

Ward vs. Busack, 46 *Wis.* 408.

57 " 300

The same practice governs in the Federal court, sitting in Wisconsin.

Chemung Canal Bank vs. Lowery 93 *U. S.* 72.

III.

It is immaterial to the plaintiff's right of recovery whether the conversion took place in Michigan or Wisconsin. The action is transitory and lies for a conversion committed in a foreign jurisdiction.

Tyson vs. McGinnis 25 *Wis.* 656.

1 *Chitty Pleadings* 269.*

IV.

The action brought by the defendant in error, in Menominee county, Michigan, in no way affects the plaintiffs' right to recover. Neither of the plaintiffs in error were parties to that action, and no proceedings or judgment therein could in any way affect their rights. There can be no pretense that Klass was a party, and the fact that Powers was Geekie's deputy, could in no way affect Geekie's interests or rights. The action was against Powers individually, and not in his official capacity. There was no attempt to sue the sheriff. That action was simply an instrumentality resorted to, to more easily effect the conversion of the logs. All that concerns us is the fact that the defendant in error got them, not how nor by what means. If they owned the logs they had a right to take them. If they were the plaintiffs' logs *they* have a right to recover for them.

V.

The plaintifis are entitled to recover—*first*, the value of the property at the time and place of conversion, with interest from the date of conversion.

Chapman vs. Ch. & N. W. R. R. Co. 26 *Wis.* 304.

Field on Damages §792.

Ripley vs. Davis 15 *Mich* 75-80.

VI.

In addition to the value of the logs and interest, the plaintiffs are entitled to recover the additional expense necessarily incurred in the endeavor to retain the property from the wrongful interference of the defendant.

Field on Damages §732, *pg.* 591, §797. §781, *pg.* 620.

Rice vs. Nickerson 9 *Allen* 478. This was trespass for taking away the plaintiff's boy. Dewey, J., says: "The defendant, although acting without any other purpose than to obey the order of those persons who illegally assumed to direct the removal of the boy from the custody of the father, became liable to the father for the extent of his actual injury sustained thereby, and this would include reasonable and proper expenses incurred in the attempt to regain the possession of the boy."

Bennett vs. Lockwood 20 *Wend.* 223. Nelson, Ch. J., says: "It is insisted for the plaintiff in error, that the common pleas erred in allowing the plaintiffs to recover for the time spent and expense incurred on the ground that the damages thus claimed were not the natural or necessary consequences of the wrongful taking. Admitting the counsel for the plaintiff to be right in this proposition, it is no objection to the recovery if the damages were proximate and not too remote, and were claimed in the declaration." The expenses for which the recovery was allowed were incurred by a

bailor in endeavoring to regain his property which had been wrongfully taken by the defendant form his bailee.

Miller vs. Garling 12 *How. Pr.* 203.

If these extra expenses had been incurred directly by Klass and he were the sole plaintiff he could certainly recover.

VII.

The right of recovery for these extra expenses is the same, although incurred by Geekie in the attempt to execute his writ in the case of Laer vs. Klass.

(1.) All expenses incurred by the sheriff in the execution of the writ are taxable costs against the defendant. Hence all these expenses are paid by Klass. Among the items taxable as disbursements are "all fees of officers allowed by law." *R. S. Wis.* §2921, and among the fees allowed sheriffs are: "All such necessary expenses incurred in taking possession of any goods or chattels and preserving the same, as shall be just and reasonable in the opinion of the court. *R S. Wis.* § 731, *sub.* 25.

Addington vs. Sexton 17 *Wis.* 333.

Drake on Attachment § 311.

Tyler vs. Ulmer 12 *Mass.* 163.

Gleason vs. Briggs 28 *Vt.* 136.

(2.) The sheriff, Geekie, having levied on the logs, it was his right and duty to protect his posses-

sion by the exercise of all needful force, and the incurring of all necessary expense.

Drake on Attachment §§ 297–298–302.

Addington vs. Sexton, supra.

Tyler vs. Ulmer 12 *Mass.* 163.

(3.) It matters not that the property passes out of the sheriff's county or state. His responsibility for, and his right to protect and retake it, is the same.

Drake on Attachment § 297.

Lovejoy vs. Hutchinson 23 *Me.* 272.

Utty vs. Smith 7 *Vt.* 154.

Brownell vs. Manchester 1 *Peck* 232.

Rhodes vs. Wood 41 *Barb.* 471.

(4.) The place where the logs were wrested from Geekie's possession and these extra expenses were incurred was within his jurisdiction as sheriff of Oconto county. The Menominee river forms the boundary between Michigan and Wisconsin. § 3 *of the enabling act of August 6th*, 1846, under which Wisconsin was admitted into the union, *R. S. Wis. page* 1155, reads as follows: "The said state of Wisconsin shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on said state of Wisconsin, so far as the same shall form a common boundary to said state or states now or hereafter to be formed or bounded by the same."

VIII.

The right to recover for the special damages not only exists in Klass as the general owner of the logs, and the party on whom it ultimately falls, but it exists in the sheriff, Geekie, by virtue of his special interest in the property, and his right and duty to protect it.

See in addition to the cases cited *supra*,

Badlam vs. Tucker 1 *Peck.* 389.

Lowry vs. Walker 5 *Vt.* 181.

Lathrop vs. Blake 3 *Foster* (*N. H.*,) 56.

Whitney vs. Ladd 10 *Vt.* 165.

We submit that the judgment of the Circuit Court must be reversed and the case remanded with directions to enter judgment for the plaintiffs in error for $6,731.56, being the value of the logs at the time and place of conversion and the extra expense necessarily incurred by the plaintiffs in attemptiug to retain them, with interest from April 24th, 1876, the date of conversion.

SAMUEL D. HASTINGS, JR.,

GEO. G. GREENE,

Attorneys for Plaintiffs in Error.

OFFICE SUPREME COURT U.S.
FILED
NOV 20 1882
JAMES H. McKENNEY, Clerk.

16311

IN THE

Supreme Court of the United States.

October Term, 1882.

PETER W. GEEKEE, SHERIFF, &c.,
PLAINTIFF IN ERROR,

vs.

THE KIRBEY CARPENTER COMPANY,
DEFENDANT IN ERROR.

No. 93.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

THE MICHIGAN JUDGMENT AGAINST POWERS.

I.

The Michigan court never obtained jurisdiction of Powers. Process was served on him on an island in the Menominee River, near its mouth. (R., fol. 48.) This was within the jurisdiction of Wisconsin, and not within the jurisdiction of Michigan.

Section 2 of the act of Congress approved August 6, 1856, the enabling act under which Wisconsin was admitted into the Union, provides "that, to prevent all disputes in reference to the jurisdiction of islands in the said Brule and

Menominee Rivers, the line be so run as to include within the jurisdiction of Michigan all the islands in the Brule and Menominee Rivers (to the extent in which said rivers are adopted as boundary) down to and inclusive of the Quinmesec Falls of the Menominee, and from thence the line shall be so run as to include within the jurisdiction of Wisconsin all the islands in the Menominee River from the falls aforesaid down to the junction of said river with Green Bay. *Provided*, That the adjustment of boundary, as fixed in this act between Wisconsin and Michigan, shall not be binding *on Congress* unless the same shall be ratified by the State of Michigan on or before the first day of June, one thousand eight hundred and forty-eight." (*R. S. Wis.* 1858, *p.* 1082.)

Having adopted her Constitution, Wisconsin was admitted by act of Congress approved May 29, 1848. (*R. S. Wis.* 1858, *p.* 1084.) Section 1 of that act provides "that the State of Wisconsin be and is hereby admitted, * * * *with the boundaries prescribed by the act of Congress approved August 6th*, eighteen hundred and forty-six, entitled," &c.

The United States, Michigan, and Wisconsin have always treated that as the boundary line, and the island in question as Wisconsin territory. Of all these facts the court takes judicial notice.

Brown v. *Piper*, 91 *U. S.*, 37–42, Mr. Justice Swayne says: "Courts of the United States take judicial notice of * * * the boundaries of the several States and judicial districts," "of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper."

II.

If jurisdiction over Powers was obtained, it did not affect Geekee.

These facts must not be lost sight of.

(1.) The action was replevin—a possessory action. Powers did not at the time have possession of the property. He made the levy, as Geekee's representative, April 24, and on May 9 turned it over to Geekee. (*R.*, *fol.* 29–43.) The possession of a million feet of logs in a jam of 100,000,000, is, in the nature of things, but constructive. Powers had been away attending to other duties; was accidently and temporarily on the island, and, while there, assisted. Service was made at that time.

(2.) Geekee did not appear and defend or in any way connect himself with the action.

(3.) There is nothing in the case showing that Geekee had any knowledge of the action.

(4.) The action is not against the sheriff in his official capacity. Had it been, service on Powers might have been of some avail. It stands on the same footing as if it had been brought against the humblest laborer that Geekee employed to assist for a day.

III.

Had Geekee controlled and defended that action under his writ, he might have been bound by the judgment. Nothing short of such interference and defense should bind him.

Alexander v. *Taylor*, 4 *Denio* 302, the court say: "It is not enough that the person against whom the former judgment was rendered was the servant of the party against whom it is offered in evidence and had attempted to defend in that character."

Freeman on Judgments, *sec.* 164: "Agents and principals, as such, do not have any mutual or successive relationship to rights of property."

To hold that a master or principal can be bound by a default judgment taken against an agent or servant in an action of replevin for property not at the time in the agent's or servant's possession, but in the possession of the master or principal, and of which action the master or principal has no notice, would be most disastrous. No sanction, I think, is found for such a doctrine in the books.

IV.

Counsel for defendant cited several cases in support of his positions. *Lovejoy* v. *Murray*, 3 *Wall.*, 1; *Glass* v. *Nichols*, 35 *Me.*, 328; *Warfield* v. *Davis*, 14 *B. Monroe*, 40; *Tasleton* v. *Johnson*, 25 *Ala.*, 300; *Peterson* v. *Lothrop*, 34 *Penn. Stat.*, 328; *Castle* v. *Noyes*, 14 *N. Y.*, 329,—were all cases where the party against whom the judgment was used was the real party in interest and assumed the conduct and control of the litigation, and was treated by the court as the real party in interest. The cases all turn upon that fact. In *Castle* v. *Noyes*, 14 *N. Y.*, 32, the court say: "The case would doubtless have been different if the plaintiff had not, in fact, defended their servant Rouk in that action."

Chicago v. *Robbins*, 2 *Black*, 418, *S. C.*, 4 *Wall*, 658, is referred to. There was no mutual or successive relation-

ship to rights of property between those parties. Robbins had committed a tort, for which the city stood primarily liable. Robbins was liable to indemnify the city. The question was whether Robbins was bound by a judgment against the city as to the cause of action and extent of the injury. It was claimed not, because formal notice and tender of the defense of the action against the city was not given him. This court held that not necessary. Davis, J., says: "He knew that the cause was in court; was told of the day of trial; was applied to to assist in procuring testimony, and wrote to witnesses," &c. It was held that his knowledge and opportunity to defend were sufficient to make the judgment binding on him.

V.

If Powers had defended the action he would have succeeded, on the ground that he did not have the property. Had Geekee assumed the defense and placed it on that ground the result would have been the same. In either event the judgment would not have bound the Kirbey Carpenter Company as to their claim of title to the logs.

VI.

Should the judgment be held binding on Geekee, yet it in no manner affects Klass, the owner of the property. He is certainly entitled to judgment for the value of his property converted by the defendant. His ownership is of the whole property. If Geekee has any interest, it is merely a lien, and the right to possession of enough of the property to satisfy it. If Klass had sued alone, and not jointly with Geekee, he could have recovered the entire value of the entire property as against the wrong-doer.

The defendant cannot limit the amount of Klass' recovery below the value of the property to the extent of a lien upon it in favor of Geekee or any other party. A wrong-doer cannot make that defense. It can only avail the party holding the lien when he is the defendant.

Shaw, Ch. J., in *Chamberlain* v. *Shaw*, 18 *Pick.*, 284, in speaking of the limitation of the general owner's right to recover the whole value arising from an interest in the defendant, says: "If for any cause the defendant is not entitled to the balance of the value, a very different rule would prevail, and justice would require that the whole value of the property should be assessed to the plaintiff."

Fowler v. *Gilman*, 13, *Met.*, 267.

Anger v. *Taunton Paper Co.*, 1 *Gray*, 621.

Geekee either has an interest or lien, or he has not. If he has not, Klass is entitled to recover the full value of the property, beyond question. If the judgment binds Geekee, and not Klass, it simply has the effect of relieving the property from the lien of the attachment. Geekee then stands on the record as having no interest in the recovery; but Klass has a right to recover the full value of his property.

It is well settled, under the Wisconsin code, that the presence of a party plaintiff on the record that has no interest in the cause of action, or right to recover, is immaterial. It is no ground for demurrer.

Boyd v. *Beaudin*, 54 *Wis.*, 193.

Willard v. *Reas*, 26 *Wis.*, 540.

Marsh v. *Supervisors*, 38 *Wis.*, 250.

VIII.

If it should be held that there can be no recovery on the cause of action stated in Geekee's favor, that does not pre-

vent a recovery for the cause of action established in Klass' favor, whether that be the whole value or the value less the value of the Geekee interest.

The complaint does not proceed on the theory of a joint cause of action, but separate interests in the several plaintiffs—separate causes of action.

23 *Wis.*, 500.

Concede, for the argument's sake, that they were improperly united. By not demurring on that ground the objection was waived. Among the grounds of demurrer specified (*R. S. Wis.*, *sec.* 2649) are (4) "that there is a defect of parties, plaintiff or defendant;" (5) "that several causes of action have been improperly united." The first ground of demurrer is want of jurisdiction; the sixth, failure to state a cause of action. (*Sec.* 2654.) "If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same," except the first and sixth grounds. (*Hall* v. *Gilbert*, 31 *Wis.*, 691.)

R. S. Wis., *sec.* 2651: "The demurrer shall distinctly specify the grounds of objection to the complaint in the language of the subdivision of section," &c.

Having waived the objection to trying the case on these two claims, if any existed, it follows, as a matter of course, that the plaintiff must have judgment on either or both causes of action, as the proof may warrant.

IX.

The practice in Wisconsin is to bring all interested parties in, and the court has full power to render judgment in accordance with their rights.

R. S. Wis., *sec.* 2600: "The distinctions between actions at law and suits in equity, and the forms of all actions and suits, have been abolished," &c.

Section 2602: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided by law."

Section 2883: The judgment "may determine the ultimate rights of the parties on each side as between themselves."

Section 2886: "The court may grant him (the plaintiff) any relief consistent with the case made by the complainant and embraced within the issue."

Section 2602 is not limited to actions formerly denominated equitable, but includes legal actions, and it is not necessary that the interests joined should be joint. Where property has been injured by the wrongful act of the defendant, all who have an interest in the recovery, although their interests may be several, may join.

Schiffer v. *City of Eau Clair*, 51 *Wis.*, 385, contains a full discussion of the provisions of the code, and fully justifies the joinder of the plaintiffs and their claims in this action.

Swarthout v. *Ch. and N. W. R. R.*, 49 *Wis.*, 625.
Ela v. *Bankes*, 37 *Wis.*, 89.

It is not necessary that judgment should be rendered against Geekee, if, on the facts found, he has no right of recovery. Judgment goes for the plaintiffs for the amount that the defendant is responsible to any or all of them. He is not liable to suit again by either or any of them for the same cause. How the plaintiffs divide the recovery between themselves is something that does not concern the defendant.

Schiffer v. *City of Eau Clair*, 51 *Wis.*, 385.

SAM'L D. HASTINGS, Jr.,
Counsel for Plaintiff in Error.

16379

IN THE

SUPREME COURT

OF THE

UNITED STATES.

PETER W. GEEKIE, SHERIFF, ETC., *Plaintiff in Error,*

vs.

THE KIRBY CARPENTER CO., *Defendant in Error.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

L. S. DIXON,
Attorney for Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

PETER W. GEEKIE, SHERIFF, ETC., *Plaintiff in Error,*

vs.

THE KIRBY CARPENTER CO., *Defendant in Error.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

This was an action by the plaintiff in error, who was the plaintiff below, to recover the value of a quantity of pine saw logs, alleged to have been wrongfully converted by the defendant to its own use, and also to recover compensation for certain time, service and moneys, claimed to have been expended by the plaintiff in endeavoring to take and hold possession of the logs. The plaintiff was sheriff of Oconto county, in the State of Wisconsin, and claimed to have had, and to hold, possession of the logs

by virtue of a writ of attachment, issued out of the circuit court for said county of Oconto, in favor of one Joseph Laev and against one William Klass, to enforce a lien for supplies alleged to have been furnished by said Laev to said Klass, and used by the latter while he was cutting and banking the logs upon the Menominee river in the winter of 1875-6. The Menominee river at that point constitutes the dividing line between the States of Wisconsin and Michigan, and the logs were cut and banked on the ice in the river on the Wisconsin side, in Oconto county, to be floated down the river in the spring. In the spring of 1876, but after, as it is claimed, the levy of the attachment by the plaintiff through one Millard F. Powers, his deputy, in whose hands the writ of attachment was placed, the logs were, according to the intention and purpose of all parties concerned, as well the plaintiff and his deputy as Klass and Laev, the attachment debtor and creditor, together with a great number of logs belonging to other parties, floated and driven down the river until they came to the dividing piers, which were managed and controlled by a corporation, known as the Menominee River Manufacturing Company; and having reached such piers, they were, with the exception of a small quantity, 158,364 feet thereof, not in controversy in this action, carried or driven by the current to the Michigan side of the channel of said river, and there replevied by the defendant in this action upon a writ issued out of the circuit court of Menominee county, Michigan, as set forth in the record. To that action the deputy sheriff of Oconto county, Powers, who served the process of attachment, was made a party defendant, and was duly served with process in Menominee county, Michigan, at the time the logs were there replevied and delivered to the defendant in this action. Powers, together with the plaintiff Geekie, was present in Michigan, attempting to take, or

hold, possession of the logs when the writ of replevin was sued out, the logs taken by virtue of it, and the process served upon him. This was on the 31st of May, the process of attachment having been previously served by Powers in Oconto county, Wisconsin, on the 24th of April.

In the meantime the writ of attachment, after service, had been delivered by Powers, the deputy, to Geekie, the sheriff, but this fact was unknown to the plaintiff in replevin, the defendant herein, at the time the logs were replevied. Besides Powers, the Menominee River Manufacturing Company, and one Charles J. Ellis, an agent of that company, were made parties defendant and duly served with process in the replevin suit. No appearance having been entered by Powers or any of the defendants in that suit, judgment by default against them, adjudging the title and right of possession of the logs to have been in the plaintiff, the defendant in this action, was subsequently entered, and that judgment was pleaded and given in evidence by the defendant on the trial below in bar of this action. This action was commenced in the state court on the 21st day of November, 1876, and afterwards removed to the federal court for trial.

The question of the effect of the Michigan judgment, as a bar or conclusive evidence of title in the defendant as against the plaintiff, is one which will be more particularly discussed by my associate, Mr. Brown. The court below found it unnecessary to decide this question, having determined that the title to the logs was in the defendant upon another clear and satisfactory ground. I shall endeavor to convince this court that there was no error in the decision below on the ground upon which it was placed, and that the judgment ought to be affirmed upon that ground, regardless of any other upon which it might be sustained.

Klass, the attachment debtor, who cut and banked the logs, claimed title to them by virtue of an alleged purchase by him of the standing timber from one S. A. Coleman. Coleman was a tax title speculator, prosecuting his vocation and business up in the backwoods of Wisconsin. The defendant was the owner in fee of the lands from which the logs were cut and taken, and which lands were chiefly valuable, and quite largely so, for the pine timber which was standing and growing on them. The defendant had been such owner for a number of years prior to the alleged tax sale under which Coleman set up a claim of title, and had paid all taxes assessed upon the lands as well before the alleged tax sale as for all the years subsequent thereto, down to the time of the commencement of the plaintiff's action, except the taxes for the year 1862, for which the alleged sale is claimed to have been made. By some oversight or accident such as will sometimes unavoidably happen, especially to owners of considerable tracts of lands, the payment for that year was omitted. Coleman, who is obviously the real party in interest in this action, and who put Klass forward, under color of a sale of the timber, as his representative, having discovered the omission or mistake, and obtained and recorded his so-called tax deed, then silently waited for the time to pass until, as he supposed, under the statutes of Wisconsin relating to unoccupied lands, his deed would ripen into conclusive evidence of title in himself, in the meantime permitting the defendant, in ignorance of his claim, and acting upon the supposition and belief that it was the owner, to pay all intermediate taxes and assessments. He thus silently waited, permitting the defendant so to pay all taxes and assessments, not only for the three years prescribed by the statute, but for nearly six years more, before asserting or attempting to assert any right or title to the lands. His deed was recorded April

27, 1867, and he did not set Klass in motion to cut and remove the timber from the lands until 1876, nearly nine years afterwards. This was his first attempt to assert title.

The decision in the court below turned upon the validity of the tax deed, or rather upon the question whether the instrument was a tax deed at all or not, within the meaning of the statute of Wisconsin barring an action by the former owner after the lapse of three years from the date of its record. The title to the logs depended upon the title of Coleman to the lands. If he had no title, or if his so-called deed was a nullity, to which the statutory bar could not be applied, then the logs belonged to the defendant. The District Judge directed a special verdict as to the quantity and value of the logs taken possession of by the defendant, and the description of the lands from which they were cut and removed, reserving the question of title under the tax deed to be determined upon motion for judgment on the verdict; and afterwards, upon cross motions for such judgment, the court, Judges DRUMMOND and DYER, held the deed to be a nullity, and directed judgment for the defendant.

The question of nullity arose upon the construction to be given by the court below to a statute of the state of Wisconsin, which statute was to be construed in the light of several *previous* decisions of the supreme court of the state, bearing more or less directly upon the subject. The precise question of construction had never been decided by the supreme court of the state, but several decisions had been made by that court indicating very clearly how the statute should and must be construed, and the court below, with no other guides, so far as the supreme court of the state was concerned, following those decisions, construed the statute in accordance with them.

The alleged tax sale took place in May, 1863, and the

amount of Coleman's investment for the five forty-acre tracts of land was $12.20, which included, in addition to the sums for which the lands were taxable, the sum of five cents on each certificate, or twenty-five cents in all, for United States revenue stamps placed upon the certificates. His investment in the two forty-acre tracts from which the timber was cut and removed, was $4.91, being $4.81 for taxes and 10 cents for internal revenue stamps.

The supreme court of the state had, on several previous occasions, decided that such annexation of the stamp and sale of the lands to pay for the same made the sale *utterly void*, and that the remedy for the purchaser at the sale, or of the subsequent holder of the certificate of sale, was by action against the county to *recover back the purchase money with interest*. Such was Coleman's clear remedy upon the certificates here in question.

The decisions of the supreme court of the state respecting the invalidity of the sale on account of the price of the stamp being included in the sale, were in harmony with the case of *The Collector* vs. *Day*, 11 Wall., 113, and several others in this court, if indeed it was the intention of Congress, by the acts of July 1, 1862, and March 3, 1863, to require an internal revenue stamp to be affixed to a certificate of tax sale.

The statute which the court below was called upon to construe, was Sec. 5 of Chapter 138, of the General Laws of Wisconsin, for the year 1861, and reads as follows:

"No action shall be commenced by the former owner or owners of any lands, or by any person claiming under him, to recover possession of land which has been *sold* and *conveyed* by deed for non-payment of *taxes*, or to avoid such deed, unless such action shall be commenced within three years next after recording of such deed."

Defeated in the court below, upon what that court, after the most mature consideration, and in accordance with

the previous decisions of the supreme court of the state, deemed to be the true and proper construction of the statute, the next expedient on the part of Coleman was to get cause involving the same question of construction before the supreme court of the state, and, if possible, to obtain a decision of that court varying the construction of the statute from that clearly indicated, if not expressly aided, by its former decisions. In this expedient, most unfortunately for the cause of justice and sound law, he was successful. This suit of *Milledge* vs. *Coleman*, 47 Wis., 184, was instituted and taken to the supreme court of the state, and there decided, Coleman being represented in that case by the same attorneys who appeared for him in this. The object of that proceeding was plain. It was, if the decision of the supreme court of the state was favorable to Coleman, to enable him to use it as a ground for reversing the judgment of the court below in this action upon the writ of error taken to this court. It was, if possible, to enable him to convict the court below of error upon an *after-made* decision of the supreme court of the state, and that, notwithstanding, there may have been no error in the judgment or decision of the court below at the time it was made, and no want of conformity to the previous decision of the supreme court of the state upon the question of statutory construction under consideration.

Such is a sufficient general outline of the case to present the propositions which I propose to submit for the consideration and judgment of the Court, and which are as follows:

First—That the construction put upon the statute by the court below was correct on principle.

Second—That it was correct according to the authority and decisions of the supreme court of the state as they existed at the time.

Third—That it was correct according to the authority and decisions of numerous other courts, including this court, expounding similar statutory provisions.

Lastly—That this court, if not dissatisfied with the decision of the court below, giving a construction to the statute, will not affect that decision or disturb the judgment in order to conform to a subsequent decision of the supreme court of the state.

I.

The construction of the statute by the Court below was correct on principle. It gave full and exact force and effect to every word of the statute, according to its ordinary grammatical meaning, which is the general governing principle of all statutory interpretation. When the statute says, "*sold* and *conveyed* for the non-payment of *taxes*," it must be a sale for taxes, or that which, under some circumstances, might have been a tax, in order to bring the case within the operation of the statute, according to its plain reading and import. If the sale was, in whole or in part, for that which was not a tax, and which, under no circumstances, could be a tax, it was a sale *not*

for taxes, and, consequently, not one within the words of the statute, nor within its plain intent and meaning. The bar of the statute cannot attach to such a case. It is obvious that it was never intended it should attach, unless the court can import into the statute words not found there, or give to the words found some new and hitherto unknown signification. But the court can do neither. It possesses no such power to interpolate or to modify or change the meaning of words. It must take the words, applying them in their ordinary grammatical sense, and thus determine upon the case presented, whether it is within the statute or not. When the statute says, "sold for the non-payment of taxes," it means what it says—that is, taxes, and not taxes *and something else incapable of being a tax*, and, thus construed, it ought never to be applied to such a case as this, which is neither within its letter nor meaning.

But a more particular principle governing the interpretation of statutes of this nature, and one which strongly supports and corroborates the views above expressed, is that they are to be strictly construed.

"From authorities which have been cited throughout the preceding pages, it obviously appears that statutes of limitations are to be strictly construed by courts of justice, and that, although there have been some instances in which that rule has been departed from, owing to conceptions of inherent equity, they have altogether failed in establishing a contrary precedent. Chancellor Kent, in Damarest vs. Wynkoop, 3 John's Chy. R., 146, maintained that it would not only be impolitic, but contrary to

established rule, both in law and equity, to depart from the plain meaning and *literal expression* of these statutes."

Angell on Limitations, Sec. 485.

And there are other considerations and rules by which courts are guided in the construction of statutes, which clearly sustain the same views. The purpose of a statute is not to be lost sight of when a construction and application of it is to be made. The design of this statute evidently was to promote and secure the prompt payment of taxes. It is a very arbitrary and vigorous enactment to that end; still, so far as it can be applied to that which was, or which might have been a tax, no doubt the courts must give effect to it. But it cannot be applied to that which was not and could not in state of case have been a tax. It cannot be applied to that which was, or otherwise might have been a tax, but which, as by the consideration for the sale and conveyance here, was inseparably mixed and combined with that which was not and could not have been a tax. To so apply it would be to violate the letter and meaning of the statue, and pervert the intention of the framers. It is obvious it was never their intention that it should be applied to anything but taxes, and when it cannot be applied to taxes and taxes alone, according to the plain language employed, the case is not within the statute, and its application must be rejected. To hold the contrary and apply the statute, would, it is submitted, be not only the grossest perversion of the letter and intent of the statute, but also against reason and sound public policy, as well as against the clear constitutional rights of every citizen. The constitutional rights of the citizen and their protection to the last degree, are

of paramount consideration and importance in every such case; and certainly an intention on the part of the legislature to violate such right is not to be attributed upon the words of a statute which plainly speak and indicate a very different purpose.

Now it will not be contended by counsel opposed that the five cents for a stamp for which each forty-acre tract was sold, or the twenty-five cents in all, was not an illegal exaction or excess—a sum, for the non-payment of which the taxing officer had no authority or semblance of authority to make the sale. Neither will it be contended that the legislature, if so disposed, possessed any power to authorize or direct such sale. The extent of the legislative power in this regard is well settled and well defined. The legislature can only authorize the levy and collection of taxes and sale of lands for their non-payment, to raise money for the public uses of the state, to be expended in discharging the duties or performing the functions of state government in some form. The money in question was not money to be used for any such purpose. It was not money exacted to raise revenue for the state or any municipal department of the state. It was not money exacted in the exercise of the taxing power. It was not an irregular exaction of moneys for the purpose of increasing the public revenues of the state, or which went, or was intended to go into or become a part of such revenues in any form. It was an exaction quite foreign to any purpose for which the legislature of the state could exercise the taxing power; as foreign as if the attempt had been made to exact the money to give it to a private individual, or corporation, or to another state.

It was an act in excess of all jurisdiction on the part of the taxing officer as well as of any power possessed by the legislature, and how, I ask, can the statute be construed against the plain meaning of its words so as to apply it to such a sale? I submit that it cannot be without outraging every governing rule and principle applicable to its construction. The sale was not one authorized by the legislature or which could have been so authorized. It was not one contemplated by the statute. It was made in pursuance of an unlawful and unconstitutional exaction, which the statute never intended. It was not irregular and voidable merely, but was more—it was absolutely void. It was a nullity. There was, therefore, *no sale*, and hence the statute cannot be applied. The statute contemplates a sale of some kind, regular or irregular, and not a mere nullity. The proceeding was as ineffectual and void as if no form of sale had taken place, or as if the deed had been issued and delivered when no assessment had been made or taxes levied upon the lands, neither of which cases would be within the statute or operate to close the door of investigation after the lapse of the three years.

"Excess in a levy may happen," says Judge Cooley (Law of Taxation, 296), "from a sum which has been voted for an unauthorized purpose being included with others that are authorized, or from imposing more than is permitted for lawful purposes, or from the addition of unauthorized charges, or from errors of the officers, by which either the aggregate is made too large, or individuals are charged more than their proportion. In the latter case, the individual taxes which were unjustly increased would alone be void; in the others the whole levy."

Again, speaking of the power of the legislature to require payment of the taxes, as a condition precedent to

the recovery of the land from the purchaser at the tax sale, when such recovery was sought on the ground of the invalidity of the tax proceedings, the same learned author (p. 375) says: "But if the tax itself were vicious; if it were laid for a private and not a public purpose; if it were a special and arbitrary exaction from one person, while the rest of the community, equally interested, were not taxed at all, or if for any similar reason the charge was not just and equitable as against the owner of the land or the land itself, so that the legislature could not have validated it retrospectively by a direct enactment, it is not perceived on which grounds an authority to validate it by this indirect and circuitous method can be supported. The legislature can have no more authority to compel the land owner to pay a lawless exaction to a third person, than it has to compel a like payment to the state directly. The one, as much as the other, would be robbery."

The excess here demanded was an unlawful and unconstitutional exaction of money *to be paid to a third person*, and to say that the legislature intended by the statute in question to compel the land owner to pay the money so exacted, or otherwise to forfeit all right and title to his land, is to give to the statute an altogether unauthorized construction.

The authorities generally, as stated by Judge Cooley, agree that excess of any kind, unless it be from errors in the computations of officers, makes the sale void, but the court below, in construing and applying the statute, distinguished between an excess which might, under some circumstances, have been a tax, and one which in no possible case could be, and held that the latter, however it might be with the former, could not fall within the meaning of the word taxes used in the statute. The court said: "It clearly appears that under no circumstances could this sum be added, under any law of the state, to

the taxes, and included within the amount for which the land was sold; and we hold that this circumstance rendered the sale absolutely void."

Another circumstance, bearing very strongly upon the question of construction, in the opinion of the court below, was, that the opposite construction would effectually deprive the land owner of the right of redemption, given him by the statutes of Wisconsin, unless he paid the money so unlawfully exacted. The statutes give the owner, whose land has been sold for taxes, the right to redeem the same at any time within three years from the time of sale, by paying to the clerk of the board of supervisors the amount for which the land was sold, with interest at the rate of twenty-five per cent. per annum and all subsequent charges. To apply the statute under consideration to a case like this would, therefore, have been to compel the land owner to pay that which was not, and could not have been a *tax*, in order to redeem. It would have been to compel him to choose between redemption, by paying the "lawless exaction," and the loss of his land. His right to redeem was a clear statutory one, to be exercised by the mere payment of the money, and it was never the intention of the statute under consideration to abridge or destroy that right, by compelling him, in order to avoid the consequences of a tax deed, to pay that which was not, and could not have been, a tax. Such was the view taken by the court below, and the court, in its opinion, said:

"It undoubtedly always has an important bearing upon this branch of the case, namely: that it is the right of the owner to redeem the land from the sale for the

non-payment of taxes. In all cases where there has been that included which, under no circumstances, the officer had the right to include, of course the land cannot be redeemed from the sale, unless the whole amount for which the land was sold is paid; and here there would necessarily be an exaction from the owner of an amount which, under no circumstances, he could be called upon to pay."

And, again, the court below considered the statute not one of repose, properly so called, and not to be construed as such. The land was vacant and unoccupied. It was not a statute under which, in good faith, possession had been taken, improvements made, and a full and fair consideration paid. It was not a statute under which the claimant had done any act or incurred any expense whatsoever. It was an arbitrary statute, enacted for the purpose of compelling the redemption of land from a sale for taxes, and for taxes alone, and, to that purpose, was to be restricted. It was not to be construed so as to enlarge or change its purpose, or to compel a land owner to pay that in redemption which was not, and under no circumstances could have been, a tax. The court said:

"It is to be observed that it is not a limitation which ripens into a perfect title, growing out of the possession of the land adversely by a person who has the tax deed, but a title acquired to vacant and unoccupied land when the tax deed has been recorded for three years. It seems there ought to be more rigor exercised in the construction of the statute when a party acquires title in this way, than in the case of the occupation by the possession, the

exercise of acts of ownership over it, and the cultivation and improvement of it."

Another principle by which the court below was governed in holding that there was no sale within the meaning of the statute was the familiar one, that, where an act of the kind is in any part done in excess of the authority conferred by law, the whole act is void. The officer was only authorized by law to sell for the non-payment of taxes. He had no authority to sell for the non-payment of anything else. The sale and conveyance were made for one integral sum, including that which was not, and could not, under any circumstances, be, a tax, as well as that which otherwise might have been, and both were as much beyond the power and jurisdiction of the officer as if the whole sum demanded had not been a tax, or as if the twenty-five cents had been for taxes, and the eleven dollars and ninety-five cents an unlawful excess. The officer was authorized to sell and convey for taxes alone, and the moment it appeared that the sale was not for a tax, the entire character of the proceeding was changed. The act of sale being an indivisible act, and the consideration also indivisible, the entire sale partook of the nature of the unlawful part, and the whole was without jurisdiction and void. For when, to give effect to that which might have been lawful and done by authority, the court was required also to give effect to that which was unlawful and done without authority, it was held that the entire act must fail, for, otherwise, the tax payers would be without protection or redress against the unlawful proceedings of officers, and all distinction between jurisdic-

tion and want of jurisdiction, and all between right and wrong, would be destroyed.

The principle so acted upon by the court is thus stated by Mr. Blackwell:

"It is a general principle, that if, in the execution of authority conferred by law upon a public officer or private individual, an abuse or excess of authority occurs, the entire proceedings under the authority are rendered void, and the party committing the act complained of as an abuse or excess, becomes a trespasser *ab initio*, and it is immaterial whether the authority is derived from the common or statute law."

Blackwell on Tax Titles, 437.

And on page 438, speaking of these cases where the execution of private powers have been held good *pro tanto* in equity, he says:

"While such is the general doctrine as to the excessive execution of private powers, it is believed that no case can be found where the principle has been applied to a naked statute power. In the last mentioned class of cases, the execution must be held good or bad *in toto*. There is no middle ground to be taken. The cases already cited abundantly prove that when the officer abuses his authority by selling more land than is necessary to pay the tax, his act is void."

And Mr. Burroughs, in his work on taxation, speaks of the same subject as follows:

"Where a part of the land offered for sale is liable to sale for the tax, and a part is not, or where the land is sold for *different* taxes, part of which are legal and part illegal, what is the effect of the sale? As to the illegal

part, the act of the officer is a trespass, and the trespass cannot be apportioned. That part of the act of the officer which is innocent cannot be separated from the illegal part. The power of sale in such case rests alone on the statute; if that is not followed, the acts purporting to be done under its authority are void."

Another section of the same law, which, in connection with the statute under consideration must be construed, also aided and enforced the construction which the Court felt bound to give. It was the clause of the statute declaring the force and effect of the tax deed after it was recorded, and before the lapse of the three years, and which read as follows:

"And such deed, when so recorded, shall be *prima facie* evidence of the *regularity* of all the proceedings, from the valuation of the land by the assessor up to the execution of the deed."

Before the lapse of the three years the deed was *prima facie* evidence of the *regularity* of all such proceedings, and after such lapse *conclusive* evidence, where before it had been only *prima facie*. It would become conclusive evidence upon all questions of *regularity*. The proceedings would be irregular wherever the officers had authority to act, but their action was not in conformity to the statutes. They would be *void* whenever the officers possessed no authority to act. Construed in connection with the other provision, the intent of the three year limitation seemed very plain. It was to close the door to all objections on the ground of *irregularity* after that time, but not to those on the ground

of inherent and absolute invalidity or *nullity*. Such was the clear intention of the legislature as evinced by both provisions.

Such were the principles and reasons upon which the court below proceeded in giving its construction to the statute. The court thought it was not a case calling for an enlarged or liberal construction, so as to cut off the defendant's title to the lands, or bar its remedy. It thought that every consideration of equity and justice demanded that the statute should be strictly construed, and that cases not within its letter should be excluded from its operation. The original owners had, by some mistake or oversight, failed to pay the taxes for the year in question, and the deed had been issued without their knowledge, and without information coming to them until nearly ten years after it was recorded. The taxes, always before and always after, had been promptly paid by them. The grantor, Coleman, had ample remedy to recover back his money with interest, from the county. Without doing so he had laid by for ten years, permitting the original owners annually to pay the taxes, under the supposition that they owned the lands, and knowing that they so believed. Such conduct, if not strictly illegal, was certainly very reprehensible in any moral or equitable point of view.

We submit, therefore, as an original question of construction to be determined by the court below upon principle and according to its judgment of what such construction ought to be, that the decision below was correct and should be affirmed by this Court.

And further in this connection, we desire to invite the attention of this court to the following remarks of Judge Cooley upon statutes of this nature, which give constructive possession to unoccupied lands. He says: "There is serious objection in point of policy to making the tax deed give constructive possession of the land, with the consequences that have been made to follow, whether there are, or are not, any in point of law. The principal hardships, perhaps, under any system of tax sales, spring from the fact that, in a considerable portion of the cases in which valuable lands are lost to the owners from delinquency, it is not so much in consequence of culpable neglect of the owners themselves, as through the negligence of agents, or through circumstances which have cast the ownership upon children, or other persons unaccustomed to business, who are found to be in default before they have fully become possessed of a knowledge of either their rights or their duties. In all these cases the tax purchaser knows that he has bought a title, which, if legal, is to dispossess some title previously valid, where the adverse claimant does not know or suspect that he or his land has been proceeded against for delinquency, and he may, for a series of years thereafter, continue to pay taxes without any suspicion that he is paying upon the land of another. No man thinks of making periodical visits to the records in order to see that his land is clear of liens, when he is not conscious of any default; and to allow the tax purchaser to lie by under such circumstances, without asserting a claim by entry or notice, until, by the lapse of a few years, his deed shall ripen into an indisputable title, is to encourage him to commit what, in morals at least, is a fraud upon the original owner; and the fraud is still more gross and palpable if, in point of fact, the original owner was not at all in default, and his land had been sold and

conveyed in consequence of the carelessness, incompetency, or fraud of public officers."

Law of Taxation, p. 380.

II.

The decision of the court below was in harmony with the decisions of the supreme court of the state previously made. The court below intended to conform, and did conform, to those decisions, so far as any had been made, bearing upon the question under consideration. Its decision, and the rules and principles upon which it acted, were clearly supported and confirmed by such previous decisions, as several citations will show.

The supreme court of the state had decided that the addition of the five cents for a stamp on each certificate was *in excess of any legal authority to tax*. It had decided that such addition rendered both the sale and the certificate *utterly void*. This had been so decided in—

Barden vs. *The Supervisors*, 33 Wis., 445,
Baker vs. *Columbia Co.*, 39 Wis., 447,

and in several prior cases.

In *Barden* vs. *The Supervisors*, where the legislature had attempted by statute to authorize the annexation of the stamp, and to charge the price of it as a tax upon the land, the court held the statute unconstitutional and void, as not being an exercise of the taxing power. On motion for a re-hearing and a re-argument, the court said:

"Again, it is argued that the law of 1863, which provides the way for collecting the expense of a stamp, which

was supposed to be necessary, *might be sustained as an exercise of the taxing power. But the object of that act is manifestly not to raise revenue for the state.* Besides, the constitution not only requires that the rule of taxation shall be uniform, but that taxes shall be levied on property. The objects of taxation must be property, and not tax certificates, or instruments which are merely evidence of contracts."

The same case held that the land owner could recover back his money from the county because there was no consideration for the purchase.

Similar decisions had been made in other cases where there had been an illegal excess of five per cent. added, not for the purpose of raising revenue for the public, and so not a tax, but to *increase the fees of officers.* It had been held that such excess rendered the sale and certificate not voidable merely, but absolutely void.

Kimball vs. *Ballard*, 19 Wis., 601.
Warner vs. *The Supervisors, id.*, 611.
Pierce vs. *Schutt*, 20 *id.*, 423.

In *Kimball* vs. *Ballard* the court had said:

"The adding of the five per cent. is conceded to have been illegal, and he sold the land for the entire amount, including the five per cent., being an excess over lawful taxes of $3.47. *Such sale was void.*"

Speaking of the cases cited by counsel, which the court held to be inapplicable, the court furthermore said: "They are cases where the sale was *voidable*, and not *void.*"

It thus appeared that the supreme court of the state had decided that the sale was void, that it was a mere nullity, and, such being its character, it was the same as if no form or ceremony of sale had taken place. Those de-

cisions had declared that it was not a sale; and is the court below to be reversed for following them and declaring the same thing? Clearly, it ought not. There was no ground of distinction between the cases. There was, in principle, no difference between demanding money to put in the pockets of the taxing officers, and demanding it in order to buy revenue stamps. The one was a totally illegal exaction as much as the other, and neither was for a tax, or that which, under any circumstances, could be a tax. Both were incurably unauthorized and vicious, such as there was no power anywhere in the state to ratify or confirm.

In *Knox* vs. *Cleveland*, 13 Wis., 245, where the sums for which the lot had been sold, were *taxes* in the strictest sense of the word, and, where *irregularities* in the proceedings only were complained of, the court had held that the bar of the statute attached, and the original owner was without remedy, and, in the course of the opinion, said:

"The general authority of the taxing officers and the liability of the land to taxation being conceded, all other questions are at an end. If either of them were wanting, another question would be presented. It might then be urged that there was a defect of jurisdiction; that the sale was altogether unauthorized and void, and passed no title, or color of title, and furnished nothing upon which the statutory bar could operate. Aside from these, all other matters must be considered as irregularities merely, of which the opportunity for investigation has been lost. We can perceive no reasonable ground for distinguishing between them, or for saying that the purchaser must prove a regular levy of the taxes any more than that he must prove that any other step in the proceeding has been regularly taken. The statute put them all to rest, or else none of them; and if none, then it was useless. We un-

derstand that its object was to protect those who, without it, had no protection, and are unable to see how that object can be effectuated without excluding from the consideration of courts and juries all questions *except those which concern the power and jurisdiction of taxing officers*, or the fraud and misconduct of the parties."

The language of the opinion showed very clearly, that, in the application to be made of the statute, a distinction was to be taken between that which was irregular merely and that which was void—between those acts which were within the power and jurisdiction of the taxing officers and those which were not so. Acts of the first kind, however irregularly performed, were within the operation of the statute, and objection could not be taken after the three years; but acts of the latter kind, or such as rendered the proceedings void, were not within the statute, and the bar would not attach. Such was the language of the opinion, and such the deductions to be drawn from it, notwithstanding the unguarded expression, "general authority," occurring at the commencement of the quotation. The expression was used in a case where there existed general authority in the taxing officers to demand *all the sums* for which the land was sold *as taxes*, and there was nothing in the circumstances to suggest the distinction between such a sale and one in which attempt should be made to sell for that which was not, and under no condition of things could be, a tax. The words, therefore, were not be separated from the facts of the case in which they were spoken, so as to pervert the opinion into authority for that which, taking it as a whole, it was obvious the court did not intend.

The next case in which the supreme court of the state had had occasion to consider the statute was, *The Oconto Co.* vs. *Jerrard*, 46 Wis., 317. It was a decision recently made and fully illustrated and sustained the views taken by

the court below. The question involved was of the same nature. It was whether the proceedings of the taxing officers were so without jurisdiction and void that the statute did not begin to run from the time of the recording of the tax deed there in controversy. The question there was not whether the proceedings were without jurisdiction and void *because of an excess of levy or of taxation, either for a public or a private purpose*, but whether certain *irregularities* in the assessment, such was would have avoided the proceedings before they culminated in the tax deed or before the three years had elapsed, were of a nature to take the case out of the operation of the statute, after the deed had been executed and recorded for the three years. The court, in its opinion, alluded to the irregularities of the assessment as being the same as those complained of in *Marsh* vs. *The Supervisors*, 42 Wis., 502, and held that such irregularities, not being jurisdictional defects, in the sense of jurisdiction as defined in the opinion, did not prevent the bar of the statute from attaching after the recording of the deed. In other words, the court held that the sale was a sale of the land for taxes, no matter how irregularly or unequally assessed within the meaning of the statute, and so the statute began to run from the recording of the deed. The case seemed to call for close and accurate discrimination between what was a tax and what was not a tax; what was jurisdiction and what a want of it on the part of the taxing officers, with a view to the application of the statute to deeds or instruments executed by such officers, and the distinctions taken by the Chief Justice were such as to show that the deed in question before the court below was not within the operation of the statute. The question in the supreme court turned upon the point of jurisdiction on the part of the taxing officers. If the officers had jurisdiction, however irregularly exercised, to do the

act, then the statute applied. But if the officers acted without jurisdiction, then their acts were void and the statute did not apply. The court, in its opinion, said:

"The power of taxation is an attribute of sovereignty, and can be *exercised only under express authority of the sovereign. Every tax in this state must be expressly authorized by statute.* The state acts through municipalities, and the municipalities act through officers. But the municipalities can act under legislative authority only; and without legislative authority they cannot put their taxing officers in motion. The officers may take their authority directly from the statutes, or from their municipalities under authority of statute. But their officers *ex proprio vigore* confer no authority upon them to institute a tax proceeding.

"And when municipalities or their taxing officers *assume* to levy a tax or to institute a proceeding *not authorized by statute*, they are *outside of their functions*, and are *not acting virtute officii*. They are not in the exercise of the sovereign power of taxation, and are as powerless to tax as private persons. *Their whole proceeding is a mere assumption, and absolutely void throughout for all purposes.*

"In such a case there is nothing for the statute of limitations to act upon. But when there is statutory authority within the scope of the constitution, to raise money by taxation, from property subject to taxation, *to come into the public treasury for public use*, and there is an actual attempt, under color of law, to exercise the authority, it is, while *in fieri, prima facie* a valid proceeding; and when the statute of limitations has run upon it, it is conclusively established as a valid exercise of the taxing power.

"The distinction is, in principle, like that between judicial jurisdiction and judicial error. *Want of jurisdiction is always an open question, everywhere.*"

Such were the decisions of the supreme court of the state in the cases of taxation which had been before it and upon which cases the court below was required to act in giving a construction to the statutes. In the last case the supreme court had expressly held that the distinction between jurisdiction and the want of it on the part of the taxing officers, which would set the statute to running to or prevent its application, according as there was or was not such jurisdiction, was in principle, like that between judicial jurisdiction and judicial error, and that want of jurisdiction was always an open question and ought always to be shown.

The question as to what constitutes judicial jurisdiction and what not, was one as well settled by the decisions of the supreme court of the state as by those of any other judicial tribunal. It had been thus defined by that court:

"No order which a court is empowered, under any circumstances in the course of a proceeding, to make, can be treated as a nullity merely because it was made improvidently, or in any manner not warranted by law or the previous state of the case. The only question in such case is, had the court or tribunal the power, under *any circumstances*, to make the order or perform the act?"

Tallman vs. *McCarthy*, 11 Wis., 407.

The same definition had been approved by the Court in—

Salisbury vs. *Chadbourne*, 45 Wis., 78.

Now applying this test of jurisdiction, which the highest court of the state had said should be applied, the court below was bound to hold that there was a want of jurisdiction on the part of the taxing officer, because the twenty-five cents for stamps for which the lands were

sold was a sale for that which was not a tax, and which, under *no circumstances* could have been a tax. It was not a sale which, under *any circumstances*, the officer was authorized to make.

It was to be presumed, after what the supreme court had said, that the rule, as to the jurisdiction of courts, defining what was within and what without such jurisdiction, would be unhesitatingly applied by that court to the acts of these merely ministerial taxing officers. It was to be presumed, if there was to be any relaxation of the rule, that it would be in favor of the jurisdiction of the courts and judicial tribunals, rather than that of such officers. If the sale in question had been one ordered by a court possessing precisely the jurisdiction conferred by law upon the officer making the sale, it was clear that the order and sale so made would have been in excess of jurisdiction, and so not voidable merely, but void. The principle was settled and familiar, that, if a court, or other judicial tribunal, has jurisdiction to order the payment of money, or render judgment only to a particular amount or only for a particular purpose, the order or judgment of such court or tribunal for a greater sum, or for any different purpose, is absolutely void. For example, if a magistrate, authorized by law to render judgment for the sum of one hundred dollars, should attempt such rendition for any sum in excess of that amount, no matter how small, his act would be void. It would be void, because under no circumstances could he render such judgment. No greater latitude or effect, so far as jurisdiction was concerned, could be given to a similar act when attempted to be performed by a mere ministerial officer. If the act of the judicial tribunal would be a nullity for want of jurisdiction, the act of the ministerial officer must be equally so. Such were the views of the court below upon this branch of the case, which views, it is submitted, were

correct. For, if the act in question had been the act of a court of record, directing or making the sale for that which under no circumstances the court had the power to direct or make it, the sale would have been a nullity. It could not have been anything better or different when made by a taxing officer equally without power.

Again, the supreme court had held the rule of literal construction adopted by the court below. It had been so laid down in *Sydnor* vs. *Palmer*, 29 Wis., 253, where the Court said: "Statutes of this nature, which operate in restraint of the true title, or make a certain kind of possession effectual for that purpose, if they are not to be construed strictly, yet ought not to be construed so liberally as to include within them any case not fairly *within the words*. The courts have no power of *addition or amendment*, by which they can extend the operation of the statute, or adapt it to cases not provided for. The party whose title is to be destroyed or remedy barred, may properly stand on the *letter of the statute* and insist upon a *strict compliance* with its provisions."

The same rule had been directly approved in several other cases.

Haag vs. *Delorme*, 30 Wis., 594.
Wilson vs. *Henry*, 35 Wis., 245.
Pepper vs. *O'Dowd*, 39 Wis., 245.
Wilson vs. *Henry*, 40 Wis., 594.
Lewis vs. *Disher*, 32 Wis., 504.

And, again, the supreme court of the state had frequently decided, in case of the execution of naked statutory power, that the statute must be strictly and literally complied with, or the act would be void.

Kneeland vs. *Milwaukee*, 18 Wis., 411.
Kneeland vs. *Furlong*, 20 Wis., 437.
Wells vs. *Burnham*, 20 Wis., 112.

The sale and conveyance in question were in pursuance of a naked statutory power authorizing them to be made for taxes, and not for taxes and something which was not, and could not be, a tax. They were void within the rule laid down by the above decisions.

The supreme court of the state had never decided that a sale for that which was not, and could not be, a tax, avoided the sale, for that precise question had never arisen in that court. It came up in the court below in this case for the first time, and the court was obliged, therefore, to treat and decide it as one of first impression, bringing to its assistance such decisions of the supreme court of the state as bore upon it, and which decisions we have above cited. In view of those decisions, it is confidently submitted that this court cannot say there was any error in the decision below at the time it was made, and, if not erroneous then, it could not become so afterwards by any subsequent change in the position or views of the supreme court of the state.

III.

To the proposition, that the rules and principles upon which the court below acted are well sustained by adjudications outside of Wisconsin, many authorities might be cited. We refer to the following, and to those almost at random:

In *Williams* vs. *Peyton's Lessee*, 4 Wheat., 79, speaking of such statutory powers, this court said:

"It is a naked power, not coupled with an interest; and in all such cases the law requires that every perequi-

site to the exercise of that power must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it."

In *Russel* vs. *Barney*, 6 McLean, 577, 583, where the construction of a similar statute of limitation after the sale of land for the non-payment of taxes was involved, Mr. Justice McLean used the following language:

"The right of the claimant under the ninth section is technical, and without any other merit than that of contributing, in a very small degree, to the revenue of the state. And this act, though legal, is stripped of all merit when the motive which prompted it is considered. It is a mode of acquiring real estate, not dishonest, because legal. This being the aspect in which I feel bound to consider the claim, the most rigid technical rules of construction shall be applied to it. As the acts to sustain the claim are without merit, the right must be maintained by a strict compliance with every tittle of the statute. No implication can arise in favor of the right set up; no waiver of the letter of the act for a substantial compliance with it. The claimant rests upon the letter, and by the letter his right should be adjudged."

In *Moreton* vs. *Blaisdell*, 24 Me., 281, 285, the case was this: A tract of land was partly improved, and a part of it unimproved. The statute as to improved lands required an additional notice; but the whole tract was sold without such additional notice. The sale was held void. "The whole," said the court, "both improved and unimproved, being sold at auction for an integral sum,

upon one bid, the sale cannot be good in part and bad in part; but if not valid for the whole, the title entirely fails."

In *Stewart* vs. *Corbin*, 25 Iowa, 144, 147, the court affirmed the proposition "that, where part of the land sold is liable to tax and the residue not, the sale is void as to all," for the reason "that there can be no severance in the case of an illegal tax; that there can be no such thing as upholding a sale where a part of the tax is illegal *pro rata*, but it all falls to the ground."

To the same principle see—

Stetson vs. *Kempton*, 13 Mass., 283.
Elwell vs. *Shaw*, 1 Greenl., 335.
Torrey vs. *Melbury*. 21 Pick., 70.
Drew vs. *Davis*, 10 Vt., 506.
Lacy vs. *Davis*, 4 Mich., 140.
Hull vs. *Kelling*, 16 Mich., 135.
Keemper vs. *McClelland*, 19 Ohio, 324.
Hardenburgh vs. *Kidd*, 10 Cal., 402.

In *Bucknall* vs. *Story*, 36 Cal., 72, the court say:

"The respondent concedes that the five per cent. was added without authority, and that the threatened sale for the whole amount would, on this ground, have been void. In this particular the counsel on both sides agree. The invalidity of such a sale *in toto* is settled, and such invalidity will be recognized in a court of law, as well as in equity. It was so held in an action to recover land. The entire sum is the consideration of the deed, and this be-being void in part, is void in the whole. The property must, at the time, be liable for all the taxes for which it is sold, for it is impossible to separate and distinguish between them, so that the act may be in part valid and part invalid."

And in *McLaughlin* vs. *Thompson*, 55 Ill., 249, 251, where the sale was directed by judgment of court upon a levy which was in part unauthorized and illegal, the supreme court said:

"That tax being illegal, appellant, or those under whom he claims, were not required to pay it, *nor did the law impose the duty of redeeming from the sale.* And it has been repeatedly held that if any portion of the tax is illegal or the judgment too large, only to the extent of a *few cents*, the sale and the tax deed will be void."

It is well settled that the maxim, *de minimis non curat lex*, does not apply to such cases. Thus, in *Treadwell* vs. *Patterson*, 51 Cal., 637, 638, which was ejectment founded on a tax deed, where it appeared that the several sums for which the land was liable to be sold "amounted, in the aggregate, to thirty-one dollars and eleven cents, and at the sale the land was sold for thirty-one dollars and forty-seven cents, being an excess of thirty-six over the whole amount due, including costs and charges," the sale was held wholly void. The court said:

"In such cases the rule, as stated by Judge Cooley in his late work on taxation, is, that 'a sale for anything more than is lawfully chargeable is a sale *without jurisdiction*, and therefore void.' In such cases the maxim *de minimis non curat lex* does not apply, except in a limited sense. The rule, as established by the authorities, is that if the excess be as much as the smallest fractional coin authorized by law, the sale is void. Tested by this rule, the sale in this case was void."

And to the same effect was the decision of the court in *Case* vs. *Dean*, 16 Mich., 12, 33, as well as in the following cases—

Glidden vs. *Chase*, 35 Me., 90.
Thayer vs. *Mayo*, 34 Me., 139.
Grosvenor vs. *Cheney*, 48 Me., 338.
Boyden vs. *Moore*, 5 Mass., 365.
Pickett vs. *Breckenridge*, 22 Pick., 297.
Cheney vs. *Stevens*, 97 Mass., 77.

And it had been not unfrequently decided in other states, under similar statutes, that they could not be applied where there was no sale, or the sale was void for want of jurisdiction to make it.

Thus, in *Case* vs. *Albee*, 28 Iowa, 277, it was held that, notwithstanding the lapse of five years from the recording of the deed, the original owner might show that no sale had been made.

And in *Nichols* vs. *McGlathery*, 43 Iowa, 189, that the statute of limitations did not apply where the assessment was void, because in that case there could be no sale which the law would recognize.

So in *Patton* vs. *Luther*, 47 Iowa, 236, it was decided that an action by the original owner would not be barred in five years from the time of the execution of the tax deed, where the sale for taxes was void.

And the same principle was recognized and acted in *Stewart* vs. *Trevor*, 56 Pa. Stat., 374. It was there held that the statute of limitations was inapplicable where the tax sale was void.

And the same doctrine was applied to a statute of limitation in *Miller* vs. *Miller*, 10 Texas, 319.

The foregoing are some of the authorities at large, going to show that the court below was correct in all the rules and principles by which it was governed in giving a construction to the statute.

IV.

It is not a rule, of course, for this court in all cases to follow the decisions of the state courts on the construction of state laws. Such may be said to be the general rule, but there exist many exceptions. If this court is satisfied with the decision below, then this case constitutes an exception, and the judgment below will not be reversed to conform to the subsequent decision of the supreme court of the state. The rule of this court on the subject is thus stated by the court in *Pease* vs. *Peck*, 18 How., 595, 598:

"There are, it is true, many *dicta* to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the state courts on the construction of their own laws. But although this may be a correct yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our re-

ports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under state laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a state court, as in the case of *Rowen* vs. *Runnels*, 5 How., 139. When the decisions of the state courts are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist also, when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a state.

"Parties who, by the constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court. The theory upon which jurisdiction is conferred on the courts of the United States in controversies between citizens of different states has its foundation in the supposition, that, possibly, the state tribunal might not be impartial between their own citizens and foreigners."

The foregoing remarks apply with peculiar force to the circumstances of this case. The point in decision was first raised and first decided in the circuit court of the United States. The cause in which the subsequent decision of the supreme court of the state was made was got up for the purpose of anticipating the decision of the same question then known to be pending in this court in this cause.

The opinion of the supreme court of the state is the proper subject of respectful criticism, and it is not too much to say of it, that nothing like an analytical or logical investigation or discussion of the question under consideration was attempted in it. Neither was there any attempt to harmonize it with, or distinguish it from, previous decisions directly bearing upon the same question. The decision was an arbitrary one, enunciated without giving any reasons upon which it was to be supported. As the decision of the supreme court of the state, without the reasons upon which it was founded, it must be received, and, as such, it must be examined and considered by this court. And if, in its consideration, this court shall feel compelled to differ in conclusion, it will not be the first time it has so differed, and that, too, upon the very question of *jurisdiction*, which is the vital one in this case. This court was compelled so to differ in *Mohr* vs. *Manierre*, 11 Otto, 417, where the court of Wisconsin, under a statute of the state, held that to be want of jurisdiction which, according to its own definition above quoted, was not such want. In the decision of the ques-

tion here under consideration its error was the reverse. It held that to be jurisdiction which, by its own definition, as well as the definition of this court, was clear want of it.

It is submitted that the judgment of the court below should be affirmed.

L. S. DIXON,
Of counsel for defendant.

Oct. 19, 1882.

OFFICE SUPREME COURT U.S.
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16-379

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

Peter W. Geekie,
Sheriff, etc., PLAINTIFF IN ERROR,
—VS—
The Kirby Carpenter Co.,
DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

B. J. BROWN,
Of Counsel for Defendant in Error.

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BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

The conduct of the trial of this cause in the court below, may seem to invite a word of explanation as preliminary to any discussion of the merits. In accordance with a practice then prevailing in that Court, such controverted questions of fact as the Presiding Judge thought important, were by him submitted to the Jury for a special finding, upon the understanding that the Jury should be discharged and the cause be heard by the Court upon the find-

ings and the records and evidence in the cause as upon a case made. This sufficiently appears from the motion of the plaintiffs for judgment (*Record p. 13, fol. 30,*) from the general frame of the bill of exceptions and from the statement therein that "both said plaintiffs and said defendant filed motions for judgment on the pleadings, records and evidence in said cause," (*Record, p 21, fol. 49.*)

In addition to the points made by my associate, it is insisted upon the part of the defendant, that the judgment of the Court below should be affirmed, for the reasons:

I.

Upon the case, as it stands, judgment must pass for the defendant, unless the plaintiffs may jointly recover, and there can be no such joint recovery, because:

1. The plaintiff, Geekie, was concluded by the judgment of the circuit court of Menominee county, Michigan, and hence had no interest in the subject matter of the action at the time of the commencement thereof.

In the first place, it is to be conclusively assumed that M. F. Powers, the under Sheriff of Oconto county, Wisconsin, levied upon and attached the logs in controversy on the 24th day of April, 1876.

The complaint alleges the levy (*Record, p. 3 fols. 6-7*) and the bill of exceptions sets forth that on that day "said sheriff by and through M. F. Powers, his under sheriff, levied upon said logs," (*Record, pp. 18-19, fol. 43*).

This levy thus made by Powers, the under sheriff, essentially involved such transactions as to make him a trespasser in respect to the defendant company, claiming to be the owner of the logs. Its right of action vested at once upon the levy Whether, or not, the sheriff would be liable in trespass, in a like case without proof, not here appearing, may be open to debate. Can there be a doubt that Powers was a proper party defendant in replevin, or that a judgment against him would bind Geekie as sheriff?

Mr. Greenleaf, commenting upon the Duchess of Kingston's case, says: "But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceeding." (Greenleaf Ev., Vol. I, Sec. 523). See also—

Carver vs. Jackson, 4 Peters, 85.

The judgment was admitted in evidence under the answer, without amendment or supplemental pleading, subject only, to the objection that neither of the plaintiffs in this action, were parties to the action

in which that judgment was rendered. (*Record, p. 20, fol. 47*). The cause in which that judgment was rendered, was commenced on the 31st day of May, 1876. (*Record, p. 20, fol. 47*). This fact makes it proper to remark, here that the 2d finding of the jury (*Record, p. 12, fol.* 28) that the plaintiffs took possession of the logs on the 24th day of April, 1876, is inconsistent with the findings 7 and 8, (*Record, p. 12, fol. 29*); is expressly negatived by the complaint, (*Record, pp. 3 and 4, fol. 7-11,*) and by the statement in the bill of exceptions, "that all of said logs that were taken from said plaintiff after the issuing of said writ of replevin were taken by said sheriff (of Menominee County, Michigan,) and his posse, acting under the authority of said writ, and that not to exceed twenty of said logs came to the possession of said defendant before the issuing of said writ of replevin." (*Record, p. 20, fol. 48*). That Powers turned over the writ to the plaintiff Geekie on or about May 9th, 1876, the defendant having no notice of the fact, (*Record, p. 19, fol. 43 and 44*), is wholly immaterial. At the time of service of process in the replevin suit, Powers, it appears from the bill of exceptions, "was assisting said Geekie in his endeavors to retain the logs under said writ of attachment under which they were levied on by said Powers." (*Record, p. 20. fol. 48*). Without notice of the transfer of the writ, the defendant had a right to infer that Geekie was assisting Powers, and not

that Powers was assisting Geekie, who for all that appears was unknown to defendant. Manifestly there was no outward or visible change in the possesion of the logs.

The plaintiff Klass has seen fit to unite Geekie with himself as co-plaintiff. He is, therefore, bound, upon the record, as it stands, by this judgment, equally with Geekie, for otherwise no effect can be given to it.

2. But wholly apart from any question as to the effect of this judgment, all the logs in controversy came to the possession of the defendant on the Michigan side of the main channel of the Menominee river. (*Record, p. 20, fol. 46*). They never afterwards came into the waters of the state of Wisconsin. Possibly, upon the assumption that Klass was the owner of the logs, an action might have been maintained against the defendant for interfering with the passage of the logs down the river by reason whereof the lien of the attachment was lost. But that is not the case made by the complaint. That alleges that the defendant, "while said logs were floating in the waters of this State [Wisconsin] converted the same to its own use." (*Record, p. 4, fol. 10.*)

If Geekie ever had any right of action as against the defendant, it must have arisen at the moment

of the alleged conversion. Obviously this could not be so, for the log lien law of Wisconsin has no extra territorial force. The lien—suspended while the logs remained in Michigan—was never revived by their return to Wisconsin. The appropriation of the logs by the defendant was begun, continued and ended in Michigan. Geekie, therefore, had no interest in the subject matter of this action at the time of the commencement thereof; and no such interest, even as between the plaintiffs, can be predicated upon the case made by the complaint. One observation should be added here. By some adroitness the bill of exceptions is made to speak of the logs as having been taken from Geekie. Upon a survey of the whole testimony this is immaterial whatever inference counsel may seek to fasten upon it. They were all taken in Michigan, and there Geekie was not a sheriff but a citizen of another state. Between Geekie and Klass and between Geekie and Powers, the writ of attachment having been turned over to Geekie, it is accurate enough to say that the logs were taken from Geekie. As between Geekie and the defendant, or as between Klass and the defendant, the logs, so far as the defendant knew or was bound to know, were taken from Powers and his employees. He had levied upon the logs in Wisconsin. He continued to assert control over them after they came within the state of Michigan.

II.

The tax deed to S. A. Coleman, under which plaintiffs claim, is not substantially in the form prescribed by statute, or in any equivalent form, and is void upon its face.

The deed having been received in evidence, these objections go to its value and efficacy in drawing to Coleman, as grantee, the constructive possession of the premises, so as to set the three years limitation statute in motion to cut off the title of the original owners.

The statute above referred to is Chapter 22, General laws of Wisconsin, 1859. Section 50 of this act declares that the deed "shall be substantially in the following or other equivalent form;" then follows the form.

Upon recurring to this form, it will be seen that the words "in the whole," contained in the 14th line of the recital, are tautological and may be wholly omitted without any alteration of the sense of the instrument. Still they are there, and their entire omission would be a departure from the prescribed form, a substantial variance and in no sense the equivalent in form. In Lain vs. Cook, 15 Wis., at page 448, the Supreme Court of Wisconsin say: "There can be no doubt that it is entirely

competent for the Legislature to prescribe the form of a tax deed to transfer title, and when a particular form is prescribed, it must be substantially if not literally pursued, or the deed will be void." Citing,

Chandler vs. Spear, 22 Vt., 388;
Ferris vs. Crow, 5 Gilman, 96;
Smith vs. Hileman, 1 Scammon, 323;
Atkins vs. Kinnan, 20 Wendell, 246;

And they held the omission of the words "*as the fact is*," contained in the form, to be a fatal defect.

In Lain vs. Shepardson, 18 Wis., at page 62, the same court say: "The purchaser when he obtains his tax deed must see to it that it is made and executed according to law. And when the law gives him the precise form it is no hardship for him to see that his deed conforms to it;" and they affirmed their former ruling.

Upon an examination of this form, rude and whimsical as it is, and these decisions of the Supreme Court of Wisconsin upon it, the validity of a tax deed issued under its sanction, should be tested by these rules:

1st. Each clause in the deed is to be interpreted in the light of its own language, and resort cannot be had to prior or succeeding clauses to add to, limit, qualify or modify its meaning.

2d. Every recital contained in the form must be regarded as material, in and of itself, and must be set forth literally, or in substance or the deed will be void.

As already remarked, the words "*in the whole*" may be omitted without any change in the sense of the instrument. But this fact only strengthens the argument for their use, or the use of an equivalent expression in their place. For, ceasing to be material in substance, they become all the more essential in respect to the form.

How stands the case here?

It is not recited that the lands were sold for the sum of twelve dollars and twenty cents "in the whole," as the form requires. The recital is that the several tracts of land, describing them, "were for the non-payment of taxes sold by R. L. Hall, treasurer of said county, at public auction at the village of Oconto, in the county of Oconto, on the 12th day of May, in the year of our Lord one thousand eight hundred and sixty-three, to the said Oconto county, and by its treasurer assigned to S. A. Coleman for the sum of twelve dollars and twenty cents "in the whole." (*Record, p. 17, fol. 39.*)

"Assigned" is the predicate verb, to which "for the sum of" relates, and the obvious meaning of the

clause, standing alone, is that the assignment of all the tracts was made for the gross sum stated. Either this is so, or thus considered, in and of itself, and giving the fullest effect to the words "in the whole," it means that the aggregate sum for which the lands were sold *and* assigned was the sum mentioned.

The clause in this deed would be less ambiguous if the words "in the whole" were omitted.

The case of Millidge vs. Coleman, 47 Wis., 184, has been referred to by my associate. It would seem, it is fair to say, to have been the intention of counsel to make a case, in the decision of which, the ruling of this court upon all of the points of objection to the tax deed to Coleman might be anticipated.

At page 188 the court passes upon the clause under consideration, but not, it will be observed, upon the same objection made to this deed in the court below. The objection was "that the deed is void on its face, because it does not show, as the statute requires, the amount for which the land was sold." That objection could not have been sustained if the words "in the whole" were omitted, the clause not being obscured by the interpolation respecting the assignment. So obscured, what the statute declares shall be stated in terms, is left to inference and to an inference arising out of the succeeding clause in the deed, to which the court resorts. But, plainly,

the ruling of the court does not meet our objections, which go to the form of the deed. For the requirement of the statute is not that the *substance of the matter* shall be there, but *the substance of the form.* In other words, that clause of the deed must contain as direct and unambiguous a statement of the fact that the lands were sold for a given sum "*in the whole*" as is contained in the form prescribed.

If a broader claim is made for this case Millidge vs. Coleman, it is fully met by the previous decisions of the court, already cited—decisions directly upon the point, maturely considered, deliberately pronounced.

If this smacks of over-refinement, we beg leave to recall the language of Judge Cole already quoted that "when the law gives him (the purchaser) the precise form, it is no hardship for him to see that his deed conforms to it." The language of Mr. Justice McLean in Russell vs. Barney, 6 McLean, 577, may be remembered, also: "No implications can arise in favor of the right set up, no waiver of the letter of the act for a substantial compliance with it. The claimant rests upon the letter, and by the letter his rights should be adjudged."

Again, the statute requires the concurrence of a valid sale and conveyance to set this short statute of limitations in motion. That cannot be a valid

deed, under the statute, in view of all of its provisions, which does not correctly recite the amount of the taxes together with the costs and charges for which the land was sold. It is not an irregularity merely. The deed springs out of and owes its vitality to the statute, and it does not come into being as a deed, if this recital is variant from the fact. It presents the case of the execution of a naked statutory power, which must be held good, or bad *in toto*.

To the cases cited by my associate in support of the propositions discussed by him, one authority may be added. In Wood vs. Meyer, 36 Wis., 308, it was contended that the sale was void, because not made on a day authorized by law. The court at page 312, Ryan, C. J., delivering the opinion, say: "To hold the deed void on the ground alleged, we must find that the day of the sale was *ex necessitate legis*, a day on which the sale could not properly take place. This we cannot do." The reason assigned by the court, being that the sale, in the absence of proof to the contrary, might have been adjourned from the day designated by the statute for its commencement, to the day named in the deed. But in the same connection the court further say: "There may be room for speculation that the officers of the county assuming Ch. 14, Laws of 1857, to be a law, postponed the sale. But in the absence of all proof

we are not at liberty to act on such an inference. If the fact be so it should have been made to appear." Here is a distinct intimation that notwithstanding the lapse of the period of limitation it is competent to show that the sale was void by proof *aliunde* the deed.

The cause then is before this court upon the whole case, as submitted to the court below. Whatever topics lay within the range of discussion there, are pertinent here. The true subject of complaint by the plaintiffs in error is the final result of their motion, and not the peculiar view of the court which led to it.

McCluny vs. Silliman, 6 *Wheat.*, 598;
United States vs. Buford, 3 *Pet.*, 12;
Davis vs. Packard, 6 *Pet.*, 41;
Corning vs. Troy Iron & Nail Factory, 15 *Howard*, 451;
Sturgis vs. Clough, 1 *Wall.*, 269.

B. J. BROWN,
Of Counsel for Defendant in Error.

EAGLE PRINT,
MARINETTE, WISCONSIN.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

(No. 93.)

OCTOBER TERM, A. D. 1882.

Peter W. Geekie,
Sheriff of Oconto County, Wisconsin, and
William Klass,
PLAINTIFFS IN ERROR.
VS.
The Kirby Carpenter Company,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

REQUEST OF DEFENDANT IN ERROR FOR REHEARING.

L. S. DIXON,
B. J. BROWN,
Of Counsel for Defendant in error.

SUPREME COURT

—OF THE—

UNITED STATES.

No. 93, October Term, 1882.

Peter W. Geekie, *Sheriff of Oconto County, Wisconsin, and* *William Klass,* PLAINTIFFS IN ERROR. VS. *The Kirby Carpenter Company,*	*In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.*

And now comes the Kirby Carpenter Company, said defendant, by L. S. Dixon and B. J. Brown, its counsel, and requests the Court to order a rehearing of this cause for these reasons, *viz:*

I.

It is respectfully suggested that the following passage of the opinion of the Court: "But aside from this, the Menominee River being as found, the

boundary between Michigan and Wisconsin at the *locus in quo*, Wisconsin has by Section 3 of the act of Congress of August 6th, 1846, (*9 U. S. statutes at large, 57,*) concurrent jurisdiction with Michigan over the waters of the Menominee River," is in conflict with Sub. 1 of Sec. 3 of Article 4 of the constitution of the United States which declares:

"New states may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, or any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of Congress."

On the 15th of June, 1836, Congress passed the act providing for the admission of Michigan into the Union. By Section 2 of this act, it is enacted: "That the constitution and state government which the people of Michigan have formed for themselves be, and the same is hereby accepted, ratified and confirmed, and that the said State of Michigan shall be and is hereby declared to be, one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States, in all respects whatever: *Provided always*, and this admission is upon the express condition that the said State shall consist of, and have jurisdiction over all the territory included within the following bounda-

ries, and over none other, to wit." Then follows the designation of such boundaries.

These boundaries in respect to the Menominee river, were by this section defined and declared to be "down the center of the main channel of the same to the center of the main channel of the Green Bay of Lake Michigan."

By a succeeding section of this Act, the assent of Michigan to the boundaries thus "described, declared and established," was required "as a compliance with the fundamental condition of admission" contained in said section 2.

Such assent having been given by act of Congress, of Jan. 26, 1837, the State of Michigan was admitted into the Union on an equal footing with the original states in all respects whatever.

Section 3 of the act of August 6, 1846, was intended to apply to the waters common to Wisconsin and the territory adjoining it on the west and northwest, not then formed into states, and the general phraseology in which its provisions are couched was no doubt employed simply on the score of convenience.

It was not—it is conceived—within the constitutional power of Congress to carry the jurisdiction of Wisconsin into any part of Michigan without the assent of that state.

The question thus raised is one of great intrinsic importance to the large and growing commercial interests of the Menominee River.

II.

It is further respectfully suggested that the undisputed fact appearing from the bill of exceptions, that the logs in controversy were taken by the defendant in Michigan is equivalent to the finding of that fact under the stipulation of counsel filed at the hearing.

III.

It is further respectfully suggested that the course of decision of the Supreme Court of Wisconsin on the main question in this cause, to wit: the validity of the deed under which the plaintiffs in error assert title may not have been brought to the attention of the court with sufficient distinctness, and that the cases which most directly concern it may, in the multiplied citation of authorities, have escaped consideration. And this result may have been aided too, by the point of view from which the

general subject is regarded, in the case of Milledge vs. Coleman cited in the opinion, which is wholly at war with the cases it invokes in its support.

It is confidently asserted that the cases referred to, show: 1 That sales for taxes of the character upon which the Coleman deed issued, are void for want of jurisdiction; and (2) that being void for want of jurisdiction "in such a case there is nothing for the statute of limitations to act upon."

In the leading case of Barden vs. Supervisors of Columbia County, 33 Wis., 445, the Supreme Court of Wisconsin held that including five cents for a revenue stamp in the amount for which the lands were sold for taxes, rendered the sale void.

An examination of the case will show that the sale was held void for want of jurisdiction in the officer to make the sale.

That appears from the nature of the action, which was brought by a purchaser at the sale to recover back the money paid by him. And the Court holds (*p 451*) that "*the sale being void the plaintiff was entitled to recover the money paid and interest at common law.*"

On the point whether the action would lie, except by force of a statute, this case follows and relies upon the case of Norton vs. Supervisors of Rock Coun-

ty, 13 Wisconsin, 612. The eminent judge, who delivered the opinion in that case, with his usual firm grasp of legal principle, rests the right to bring an action at common law upon a want of jurisdiction in the officer to make the sale.

At page 613 speaking of the sale there drawn in question, which included a sum as fees not authorized by statute, the Court say: "But in case of the (this) tax sale it is not the title in the land that fails, *but it is the authority to make any sale at all. It would be analogous to an execution sale where there was no judgement or execution.*"

Again at page 615. "The Counsel for the respondent further claimed that the complaint should show that the money was demanded of the treasurer before this action was commenced. This position was based upon the statute, which makes it the duty of the treasurer to refund the money on demand. Perhaps it would be correct if the entire right of the plaintiff depended on the statute. But we do not think it does. On the contrary, it grows out of the fact that the county has received money of the plaintiff *on a pretended sale which it had no authority to make.* The statute neither originated nor destroyed the right of action."

In Milledge vs. Coleman 47 Wis. at page 185, cited in the opinion, the Court say: "It is admitted

at the outset that the county treasurer had no legal authority to include in the amount for which the land was sold, five cents for a revenue stamp, and that the tax deed could have been avoided for this illegal excess before the statute ran upon it." Citing Barden vs. Supervisors. *supra*.

The statement that the county treasurer had no legal authority to include in the amount for which the land was sold, five cents for a reveuue stamp, stops far short of the conclusion of which it forms the premise involved in the rule unequivocally assumed in Barden vs Supervisors, that he had no authority to make the sale. And further—when in the case of Milledge vs. Coleman, the Court asserts that within the period of limitation the sale might be avoided in a direct proceeding for that purpose, it again stops short of the actual decision in Barden vs. Supervisors that it might be shown to be void collaterally in a suit by the purchaser to recover the amount paid by him on the sale.

The case of Oconto Company vs. Jerrard 46 Wis. 317, cited in the opinion, is in entire harmony with the view of the subject above set forth.

There is more of the opinion than is quoted by the Court in Milledge vs. Coleman. At. page 328 Ryan C. J., says: "The power of taxation is an attribute of sovereignty and can be exercised only

under express authority of the sovereign. *Every tax in this state must be expressly authorized by statute.*"

* * * * * * * * *

"And when the municipalities or their taxing officers *assume to levy a tax* or to iuststute a tax proceeding *not authorized by statute*, they are outside of their functions, and are not acting *virtue officii*. They are not in the exercise of the sovereign power of taxation, and are as powerless to tax as private persons. Their whole proceeding is a mere usurpation, and absolutely void throughout for all purposes."

In such a case there is nothing for the statute of limitations to act upon."

* * * * * * * *

"The distinction is in principle, like that between judicial jurisdiction and judicial error. Want of jurisdiction is always an open question, everywhere. Error can be imputed only by appropriate judicial proceeding, within the time limitited by law to establish it."

"When there has been an actual attempt however defective in detail to carry out the proper exercise of the taxing power, the statute applies." That is the

rule of Oconto Company vs. Jerrard, upon the facts of that case. But the great Chief Justice takes care not to be misapprehended. The exception must be fully disclosed as not less potential than the rule. And in the pregnant passages with which he closes his opinion, he leaves nothing to implication or inference as to what is or is not "the exercise of the sovereign power of taxation."

The County Treasurer in making the sale upon which the Coleman deed issued, did assume to "levy a tax not anthorized by statute." *Eo instanti* he ceased to act *virtute officii*, and become as powerless as a private person. The whole proceeding was a mere usurpation "absolutely void throughout for all purposes," and "there was nothing for the statute of limitations to act upon."

He was "outside of his functions" in offering the land for sale. He was "outside of his functions" in making the sale, and this "want of jurisdiction is always an open question everywhere."

Thus the case of the Oconto company vs. Jerrard takes its place side by side with the case of Norton vs. Supervisors, already cited, which it broadly affirms.

In Johnson vs. Insurance Company, 51, Wis., at page 575 the Court say: "But if the position of defendant's counsel is sound, that the judgement ren-

dered by the state court was *coram non judice* and void, it doubtless may be assailed in this collateral action; for, as we understand the law, a void judgment can be the foundation of no legal right, and its validity may be challenged wherever it is attempted to be enforced. But a voidable or erroneous judgment can be questioned only in a direct proceeding, and, until avoided, may be the foundation of valuable rights. The distinction, therefore, between a void and a voidable judgment is of great practical importance, especially in cases of this nature. 'Whatever *may be avoided* may, in good sense, to this purpose, be called void, and this use of the term *void* is not uncommon in the language of statutes and of Courts. But in regard to the consequences, to third persons the distinction is highly important; because nothing can be founded on what is *absolutely void*, whereas, from those which are only voidable, fair titles may flow. These terms have not always been used with nice discrimination; indeed, in some books, there is a great want of precision in the use of them.' Parker C. J. in Somes vs. Brewer, 2 Pick., 184; Crocker vs. Bellangee, 6 Wis., 645; Bromley vs. Goodrich, 40, Wis., 131."

It is believed that no case cited by the counsel for plaintiffs in error is in conflict with the doctrine herein contended for, except the case of Milledge vs.

Coleman and that proceeds npon an obvious misconception of the authorities upon which it relies.

January 17, 1883. Respectfully submitted,

L. S. DIXON,
B. J. BROWN,
Of Counsel for Defendant in error.

OFFICE SUPREME COURT U. S.
FILED
NOV 16 1882
JAMES H. McKENNEY, Clerk

16-399

IN THE

Supreme Court of the United States.

PETER W. GEEKIE, SHERIFF, &C., AND ANOTHER, *Plaintiffs in Error,*
vs.
THE KIRBY CARPENTER CO., *Defendant in Error.*

No. 93.

Brief for Defendant in Error.

In addition to the authorities cited by Mr. Brown in support of the first point of his brief, I desire to make the following citations:

1. The statute of Wisconsin, sec. 2,883, Revised Statutes of 1878, only authorizes judgment "for or against one or more of several defendants." There is no code provision in that state, as in the State of New York, (New York Code, sec. 274,) authorizing judgment "for or against one or more of several plaintiffs."

In this case, Geekie, as sheriff, claiming a special property in or lien upon the logs, joins with Klass, as general owner, in an action to recover damages for their conversion. Such joinder is in any view anomalous, but having been made and sustained by the court below on demurrer, it

follows that both plaintiffs must recover, or that no recovery can be had. There is no statute helping the parties out in such a case.

2. The case finds that Powers, the deputy sheriff, made the levy and held possession of the logs under the writ of attachment until they were taken from him upon the writ of replevin issued out of the Circuit Court of Menominee County, Michigan. The case shows that the writ of attachment, levied by Powers, April 24th, was turned over by him to Geekie, May 9th, but not that there was any change of possession of the logs; whilst it also shows that Geekie was present with Powers, both being engaged in efforts to retain the possession of the logs when the writ of replevin was served upon Powers, and the logs taken from the possession of both Powers and Geekie by the Michigan sheriff under that writ.

Under these circumstances it seems clear that the Michigan judgment in the replevin suit was conclusive, not only upon Powers, but also as against Geekie. Powers was the agent and representative of Geekie in possession of the logs. His interest was Geekie's interest, and none other or different. If he had appeared and contested the plaintiffs' right of recovery in the replevin suit and judgment had gone in his favor, that judgment would have been conclusive in favor of Geekie upon the same questions afterwards arising between him and the Kirby Carpenter Co., the plaintiffs in replevin. Geekie knew of that suit and how and why it was that the logs were taken from the possession of Powers and himself by the sheriff of Menominee County, Michigan, and it was his right and privilege to have defended in that action, in case Powers failed to do so, and he is barred by his default and concluded by the judgment as much as Powers himself.

He had complete control over Powers and might have directed Powers to defend if he had thought proper, instead of appearing and defending himself in person. It is enough, therefore, that Geekie, as the case shows, had full opportunity to appear and defend that action, and hence he was bound by the judgment.

Chicago v. *Robbins*, 2 Black, 418.
Robbins v. *Chicago*, 4 Wall., 658.
Lovejoy v. *Murray*, 3 Wall., 1.
Murray v. *Lovejoy*, 2 Cliff., 191.
Castle v. *Noyes*, 14 N. Y., 329.
Glass v. *Nichols*, 35 Me., 328.
Warfield v. *Davis*, 14 B. Mon., 40.
Fulton v. *Johnson*, 25 Ala., 314.
Peterson v. *Lothrop*, 34 Pa. St., 228.

The case thus showing that Geekie had no title or interest at the time of the trial, the action failed on this ground, and, therefore, the judgment below was correct, and should be affirmed.

L. S. DIXON,
Of Counsel for Defendant in Error.